TRANSCRIPT OF RECORD.

UPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 107.

RTH SHORE BOOM AND DRIVING COMPANY,
PLAINTIFF IN ERROR,

vs.

NICOMEN BOOM COMPANY.

ROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED JUNE 15, 1907.

(20,762.)

Theo. Lahdi	219	126
G. Odendale	224	129

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 31, 1907.

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a NORTH SHORE BOOM AND DRIVING COMPANY, Plaintiff in Error,
v.
NICOMEN BOOM COMPANY, Defendant in Error.

Appeal from the Supreme Court of the State of Washington to the Supreme Court of the United States.

[Seal Supreme Court, State of Washington.]

b 5336.

Filed Sep. 24, 1904.
C. S. REINHART, *Clerk,*
F. S. GUYOT, *Dep.*

c In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM COMPANY, Plaintiff,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant.

Comes now the plaintiff in the above entitled action and files its proposed statement of facts, and the same said statement of facts is as follows, towit:

Filed May 31 1904 at 8:30 A. M.
E. A. SEABURY,
County Clerk.

1 In the Superior Court of the State of Washington, for Pacific County.

NICOMEN BOOM Co., Plaintiff,
vs.
NORTH SHORE BOOM & DRIVING Co., Defendant,

Testimony.

Offered in Evidence.

Be it remembered: That on the 1st day of December, 1903, there came on to be heard the above entitled cause, at the court house in South Bend, Washington, before R. B. Albertson, visiting judge, without a jury. For the plaintiff appeared Messrs. Martin C. and John T. Welsh, W. B. Stratton and Wm. H. Gudgel, and for the defendant appeared W. H. B. Hewen, W. H. Abel and Richard W. Ruffin. Whereupon the following proceedings were had herein:—

Mr. JOHN T. WELSH: The plaintiff now offers in evidence a plat, filed in the office of the secretary of state, and asks to have it marked now as "Plaintiff's Exhibit 'A.'"

(No objection being made, same is allowed to be received in evidence by the court.)

Mr. ABEL: We would like to make the objection, your honor, that it has not yet appeared that this is such a public and navigable river as comes within the purview——

COURT: The supreme court allows such latitude with a court sitting without a jury, in the matter of the admission of testi-
2 mony, that unless the evidence is plainly incompetent, that the trial judge can allow it to come in for what it may be worth.

Mr. ABEL: Of course we have an objection that this has no connection with the Nicomen Boom Co.

Mr. WELSH: We have testimony that will go with the plat.

Mr. WELSH: We now offer, subject to objection, an instrument, and ask that the same be marked "Plaintiff's Exhibit 'B.'" It is permission given by the secretary of war of the United States government to P. J. McGowan, and others, to construct a boom in North River, in this county.

(Same is received in evidence and marked "Plaintiff's Exhibit 'B.'")

Mr. WELSH: Plaintiff now offers in evidence a contract from the state of Washington to Mr. P. J. McGowan, for certain tide lands situate in this county, and asks to have the same marked "Plaintiff's Exhibit 'C.'" It is a contract, which shows that the purchase price, as attached to it,—the purchase price of said tide lands has been paid.

COURT: Are these the tide lands that you claim the plaintiff boom company purchased?

Mr. WELSH: Yes, we claim that the rudder boom is attached to the plat.

3 Mr. ABEL: We would at this time make the general objection that it is incompetent, irrelevant and immaterial.

COURT: Let it be admitted and marked in evidence.

(Same is marked "Plaintiff's Exhibit 'C.'")

Mr. WELSH: The plaintiff now offers in evidence plaintiff's exhibit "D," a deed from P. J. McGowan to the Nicomen Boom Co., the plaintiff herein, to these certain lands and other tide lands situated in this county, dated January 9, 1900.

Mr. ABEL: We would make the same objection as to the last exhibit.

COURT: Let is be admitted, and you may take your exceptions.

(Same is marked "Plaintiff's Exhibit 'D'").

(Deposition of J. S. Brace, at this time is placed on file, to be published later.)

J. M. CLAPP, called as a witness on the part of the plaintiff, after being first duly sworn, testified as follows.

Direct examination.

By Mr. STRATTON:

Q. What is your name?
Ans. J. M. Clapp.
Q. Where do you reside?
Ans. In Seattle, Wash.
Q. What is your occupation?
Ans. I am a civil engineer.
4 Q. How long have you been employed in the practice of that profession?
And. About twenty years altogether, from the time I started to study.
Q. Of this time how much has been spent in what is known as the west?
Ans. About sixteen years.
Q. And how much in the state of Washington?
A. About eleven years.
Q. What portion of the state have you been employed in during that time?
Ans. I have been employed in the southwestern part of Washington, on the Willapa Harbor, Gray's Harbor, and several other places around the Sound.
Q. Where are you at present located?
Ans. In the city of Seattle.
Q. What is your position?
Ans. Why, I am assistant engineer in charge of the construction of the canal there at Seattle for the United States Government.
Q. How long have you been assistant engineer at Seattle?
A. I have been located in Seattle since July, 1901.
Q. In whose empl-y are you?
Ans. In the employ of the United States.
Q. Under what department?
Ans. Under the war department.
Q. Who is the engineer in charge of the work in Seattle?
Ans. Major John Millis has charge of this district.
Q. How long were you located in southwestern Washington?
Ans. Why, off and on from November, 1892, until July, 1901, with some interruptions in that time while I was engaged on the Columbia river in Oregon and other works in Washington.
5 Q. What was your business while located in southwestern Washington?
Ans. The same as now, assistant engineer.
Q. What are some of the problems submitted to civil engineers?

Mr. ABEL: That is objected to as being immaterial and too general.

COURT: It does seem to be a little general.

Q. You may state whether or not civil engineers frequently have submitted to them problems pertaining to the designing and construction and location of log booms?

Ans. Why, I presume they do. Frequently a man has a scheme that he proposes to carry out, and the working part of the details, etc., is intrusted to a civil engineer.

Q. Have you had any of those plans or designs submitted to you?

Ans. Yes sir.

Q. Where?

Ans. Why, this boom of Mr. McGowan's.

Q. That is not the Nicomen Boom Co., the plaintiff?

A. The Nicomen Boom Co., yes sir; they submitted the details of the boom, or the working out of and assembling of the dolphins, were submitted to me. I would also say that the boom on Lewis river in southwestern Washington was submitted to me.

Q. Any more?

Ans. I think that is all that I can recall at the present time.

Q. Have you been acquainted with other log booms, other than the ones you have mentioned?

Ans. Yes sir.

Q. In the State of Washington?

Ans. Yes sir.

6 Q. State whether or not, as civil engineer, you have ever surveyed, located or laid out the lines of any log booms in rivers.

Ans. Yes, sir.

Q. You have made surveys of booms that have been constructed in rivers?

Ans. Yes, sir, I have made surveys of booms that have been constructed in rivers. And I have given the points—what you might call angle points; the defined lines upon which booms have been constructed.

Q. Are you acquainted with the timber in the southwestern part of Washington?

Ans. Yes, sir.

Q. As to size?

Ans. Yes, sir, some.

Q. How did you gain that knowledge?

Ans. Well, by living in a timbered country, and observing the land upon which the timber would grow,—growing timber and cut timber after it had been logged, and timber in the mill yard after it has been manufactured.

Q. State whether or not you are acquainted with the timber tributary to and in the vicinity of the North river?

A. Well I have had occasion to see and know the timber in the North river valley, tributary to the North river.

Q. How did you become acquainted with it?

A. Well, through my duties in making a trip through the country, and by going through North River valley, and going over the divide from the Willapa, and coming down, and having some work

to do in a place at the North River jam,—by cutting out some logs and drift in the jam.

Q. State whether or not you have a fair and general knowledge of the kinds and size of the timber tributary to the North river?

Ans. I presume I have.

Q. Don't you know that you have?

Ans. Yes, I guess I have.

7 Q. Now, you spoke about a jam in the North river. You may state to the court what that jam was, and what you had to do with it.

Mr. ABEL: That is objected to as being incompetent, irrelevant and immaterial.

COURT: I can't see it as yet, but he may answer, and if it is immaterial the court will disregard it.

A. The whole river was blocked from allowing anything to float down the stream by a collection of drift, and debris, composed of various things. It was composed particularly of large trees, and part of the work was in the way of supervising the taking out of a part of that jam.

Q. And this was taken out?

Ans. Well, it was taken out finally by the pioneer settlers living on North river,—that is partly by them, and partly on the contract with some men from South Bend,—I don't recall their names, and it was finally completed by the hard labor paid for by the Government.

Q. Did you cut a channel through this drift, or did you cut the whole jam out?

Ans. No, we cut out a section out of the jam.

Q. Did you, in cutting that jam out, find any logs in it?

Ans. I found material that would make logs,—trees, etc.

Q. Well, if you remember, what were the diameters of some of those logs or trees?

Mr. ABEL: We would make the same objection as before,

8 and also that it is too remote.

(Objection overruled. Exception taken.)

A. They were varied in size,—they were all diameters.

Q. What is the least diameter that you remember of as being there?

Ans. They ran from small twigs up to as high I think,—well, there was one which was certainly a whopper,—it measured about nine feet through.

Q. You mean across the butt?

Ans. I presume it was close to the stump. I don't know about that.

Q. Was it a log or a tree?

Ans. A tree; I don't think any logging was done on North river prior to the jam forming.

Q. Of course, now I have reference to the log. Now what were some of the diameters of the logs, and I am not now referring to small brush or anything of that kind.

A. Well, I don't suppose a tree is considered a log in some localities that has a diameter of six or eight inches. I don't suppose the people of Willapa Harbor would consider a tree of that size a log, but here I suppose, well, probably twelve, fourteen or sixteen inches.

Q. Now you speak of the nine foot log. Were there many of those?

Ans. That is the only one that I had any occasion to note.

Q. Did you find many logs there in the neighborhood of sixteen inches?

Ans. There were some under sixteen inches, and some were sixteen, and some I guess were over sixteen. There were quite
9 a number as large as that.

Q. Now, what from your observation of the logs and trees in that jam would you say was the average size of the logs there?

Ans. Well, that would be simply an estimate. They would approximate perhaps three feet.

Q. Then the sixteen inch logs and the nine foot logs were the extremes?

Ans. Yes, they were extreme.

Q. How much would a log say 30 inches in diameter and 30 feet long scale?

Ans. Well, that depends upon who scales the log, and it would depend upon whether the scaler was buying it or selling it.

Q. I am speaking about a fair scale?

Ans. Well, there are two or three ways of scaling a log like that.

Q. Well, what is one of the standard scales used in this state by loggers?

Ans. The state of Washington has one scale that they have adopted, or rather, the legislature has adopted.

Q. What is that?

Ans. That is the scale known as the Drew scale.

Q. That is the scale adopted by the legislature in this state for scaling logs by the state scaler?

A. Yes.

Q. What are some of the other standard scales if you know?

Mr. ABEL: That is objected to as being incompetent, irrelevant and immaterial.

COURT: I don't see the relevancy of it, but he may answer.

10 A. There is a scale known as Spauldings scale and then there is another scale known as Doyles.

Q. Now, figure up the log I have just mentioned by the Doyle scale, please.

Mr. HEWEN: I think counsel might state his purpose.

Mr. STRATTON: The purpose is to show the catching and holding capacity of a boom for the purpose of showing the enlargement or extension of the boom as being necessary. These questions are preliminary, but the purpose of the testimony is to show that.

COURT: I have no doubt the court will allow more or less testimony during the trial of this case than he would if it were before a jury.

Mr. HEWEN: The defendants object to any testimony showing the capacity of the logs in the boom of the plaintiff, and to any testimony tending to show an intention on the part of the plaintiff to extend its boom beyond the limits of its originally constructed boom.

COURT: I don't understand any such testimony is being offered as to that. The objection will be overruled.

(Question repeated by stenographer.)

Mr. ABEL: We would object, because the witness has not shown himself competent to do so.

COURT: The witness has not hardly been qualified as an
11 expert log scaler.

Q. Are you familiar with the method of scaling logs by the Doyle scale?

Ans. Yes, sir.

Q. Have you in your capacity as an engineer been called upon to scale logs by that log scale rule?

A. Yes, I have done it, but not for commercial purposes. I have scaled them for my own practice and my own information.

Q. You are acquainted with the methods by which logs are scaled by that rule, are you not?

Ans. Yes, sir.

Q. Proceed then to scale the log that I have given you.

Ans. Give me the dimensions again, please.

Q. 30 inches in diameter and 30 feet long.

A. 30 inches at what end?

Q. At the small end. Just let me ask you a question. When a log is scaled for commercial purposes, it is scaled from the small end?

Ans. Yes, sir.

Q. Well, we will scale this then by the small end.

A. 1,265 feet.

Q. How do you arrive at that result?

A. By applying Doyle's formula.

Q. What is that formula called? What is the rule if any?

Ans. It is called Doyle's rule for scaling logs.

Q. Now, upon what is Doyle's rule based?

Ans. It is based upon the diameter of the log, the length of the log, and the amount is obtained, or the application of the formula is arrived at by experiment in sawing up certain logs and getting certain results,—it is all done by experiment first,—as I say,
12 a man experiments by sawing up certain logs, and getting certain results, and then he finds the mathematical equasion which will fit quite accurately those results, and from that a formula is established which gives the rule.

Q. Is that rule correct when applied to small timber?

A. It is considered by some to be a trifle low on small timber.

Q. As to large timber, how is it considered by mill men?

Ans. Well, on a large timber it is considered to be much higher than some of the other scales.

Q. Higher on the large timbers than Spaulding's measure?

Ans. Yes sir.

Q. What scale is used by mill men of this vicinity, where they scale them themselves for purchasing, if you know.

Mr. ABEL: I don't think he could testify as to that. That would not be the best evidence.

WITNESS: I don't know from actual knowledge—only from men who have told me that do.

COURT: The objection will be sustained as to that. It would be a very easy matter to get the best evidence.

Q. Now, what was Spaulding's rule based on?

A. On the taking of a diameter of a log, or a section of a log and finding out,—or allowing so much for the saw cut, and see
13 how much lumber of one inch stuff was or could be sawed out of it in a practical manner.

Q. What about Drew's scale, adopted by the state of Washington?

A. It is arrived at very much in the same way, as the others.

Q. I want to know,—or compare the other two scales with Drew's scale; that is, the one used by official log scalers of the state, and I want to know whether Drew's scale will make a greater or less number of feet in a log.

Ans. Well, we will take a log 56 inches in diameter, and by Drew's method it will give you practically the same result as by Spaulding's method. But below that diameter, Drew's scale shows a log to have less than the other one does.

Q. Than either of the other scales?

Ans. Than either of them, yes sir.

Q. How do these different rules compare or apply on a 48 inch log, 30 feet long?

Ans. Well, the Drew scale would give more feet than by the Doyle scale, and less by the Drew scale,—I mean you would get more by the Doyle scale and less by the Drew scale.

Q. Tell us how many feet that log would contain by the Doyle scale.

Mr. ABEL: We think it would shorten matters to have both of these scales here, or to simply introduce both of them in evidence.

Q. Have you any of these scales here,—have you Drew's scale?

Ans. I have what is called the State Scale,—that is the
14 Drew scale.

Mr. HEWEN: We would object to the introduction of the scales as being incompetent, irrelevant and immaterial.

COURT: I think we will have the same admitted in evidence. You may take your exceptions.

(Exception taken.)

Mr. STRATTON: We would ask to have those scales marked as being received in evidence.

(Same are received in evidence and marked plaintiff's Exhibits "E" & "F.")

Q. Have you Doyle's scale?

Ans. Yes; these are all my personal property.

Q. Now, by the Doyle scale, how many feet would be contained in a log 40 inches in diameter and 30 feet long?

Mr. ABEL: We make the same objection.

COURT: He may answer.

A. Shall I examine the rule?

Q. Yes.

A. What is the size of the log?

Q. 48 inches by 30 feet long. Now, is that Doyle's rule?

Ans. This is Scribner's log book. And in applying this rule to a log 48 inches in diameter and 30 feet long I find 3,630 feet. Well, now do you want me to figure that from the large end or the small end?

Q. What did you figure it from?

A. I figured it 48 inches at the small end.

Q. That is all right. Now by the Drew scale how many feet would that log contain?

15 A. A log 48 inches at the small end and 30 feet long would amount to 3,131 feet.

Q. Now, give it to us by Spaulding's scale.

A. It would be 3,272 feet.

Q. Then Doyle's rule for a log 48 inches in diameter and 30 feet long would be 469 feet greater than the same log measured by Drew's scale or the state scale?

A. If there is a log,—well, I make a difference here of not so much as that.

Q. Well, how much; Doyle's is 3600 and Drew's 3131?

A. Well, then, it would be 499 feet.

Q. Now, Mr. Clapp, has a log the same diameter at the butt that it has at the small end?

Ans. No.

Q. What is the taper of a 30 foot log?

Ans. It depends upon the diameter of the log. Large logs—butt logs taper more rapidly than a log cut in the middle of a tree.

Q. What would it be on a log 48 inches at the butt?

A. How long a log?

Q. 30 feet.

Ans. Oh, about 6 inches.

Q. On a log 40 inches at the butt and 30 feet long what would the taper be?

Ans. Well, about five inches. It is largely a matter of the kind of timber. Some choice timber would be less, not so much, and still other timber would be more.

Q. Now, can you figure out the maximum amount of timber in logs that would occupy an acre of area? Using a log say four feet in diameter at the big end, over all, with a perfectly conical taper of six inches in 30 feet?

16 Mr. HEWEN: We would raise the same objection to this question as to the last.

(Objection overruled. Exception taken.)

A. Yes, I can.

Q. You may do that by Doyle's rule, please, and give the court the results.

Ans. What kind of a log—you mean a spruce log or a fir log?

Q. Take a fir log.

Ans. Well, you specify what would be the thickness of bark on that fir log.

Q. Well, what is the thickness of the bark on a log of that size?

Ans. It varies. I measured a log yesterday that had bark about eight or ten inches thick.

Q. What is the average on fir?

Ans. I should say probably three inches; that is, between the skin and the outside.

Q. Well, taking that into consideration what would it be?

Ans. I can give the theoretical maximum?

Q. Yes, the maximum theoretically. Take a log that is perfectly smooth and free from bark—we will say, laid close together, and put in by hand.

A. I think you would need some machinery to put them in that way; but I figure that it would be about 675,000 feet of logs, log measure.

Q. That is the holding capacity of an acre?

A. That is the theoretical holding capacity of such logs as you mention.

Q. Now, what do you mean by that?

Ans. Well, an acre of surface is ten square chains. We will take a surface of say one chain wide and ten chains long and you get an acre.

17 Q. But how are those logs packed into that acre?

A. Well, they would practically occupy all the available space in there less the diameter of the small end. Of course, you have to figure the diameter of the large end.

Q. Now, figure out the holding capacity of an acre of area with the same kind of logs according to the Spaulding rule.

Ans. About 627,000 feet.

Q. Now, figure out an acre with the same kind of logs with the state scale or Drew scale.

Ans. About 595,000 feet.

Q. There is considerable difference between those scales—which one of them gives more nearly the correct number of feet in the acre?

Mr. ABEL: We object to the witness stating his opinion without giving the basis on which he fixes it.

COURT: He may answer what his opinion is.

A. Well, that is a difficult question to answer, but from the fact that it has been adopted by the state legislature the Drew scale must have some merit to it. The others, I think, probably are based on eastern logs, and it is a matter of opinion—a matter of experiment which is the better.

Q. Now, taking the above figures as you have given them, do you think that number of feet can be crowded into an acre of area?

Ans. Well, it would be a difficult operation. I should think to do that it would probably entail more expense than would be justifiable to do it. You would have to sort those logs in the first place and get your 48 inch diameter logs, etc., and you would have to pick out perfectly cylindrical logs.

18

Q. And all of the same length?

Ans. Yes, I should think it would be—it would probably entail more trouble and expense.

Q. Now, what, if you know, would be the catching capacity of a boom per acre?

Mr. ABEL: We object to that as being incompetent, irrelevant and immaterial.

COURT: Is that question as to a practical proposition?

Mr. STRATTON: From the knowledge of the witness in his practical experience and information that he has gained from that experience.

COURT: You are not speaking of the theory now but of the practice?

Mr. STRATTON: Yes, from a practical standpoint.

Mr. ABEL: We would object from the fact that it is not shown that the witness has any practical experience or observation of that kind.

COURT: You may cross examine as to his qualification if you are not satisfied as to his competency.

Cross-examination.

By Mr. ABEL:

Q. Have you ever boomed logs, Mr. Clapp?

Ans. No.

Q. You never engaged in the operation of a boom?

A. No, sir.

Q. Have you ever been financially interested in a boom?

19

Ans. No.

Q. What has been the extent of your observation as to the holding capacity of a boom?

Ans. Why, an engineer is rather a peculiar sort of an individual—you may ask him a great many questions about different things——

Q. Well, have you ever had to investigate this matter—that is, in the way of the holding capacity of a boom?

A. Yes, sir, in the way of doing so for my own information.

Q. In what way have you investigated as to the matter of the capacity of a boom?

Ans. Well, I have made inquiry from boom owners and those operating booms in the Chehalis river.

Q. What boom on the Chehalis river?

Ans. The Chehalis boom.

Q. Who did you consult about that?

Ans. Mr. Geo. H. Emerson, and I have talked some time ago, a good many years ago with a gentleman from Aberdeen.

Q. Who?

Ans. Well, one was Mr. Clyde Weatherwax.

Q. Respecting what boom?

Ans. This same boom. It was general information picked up in little bits now and then.

Q. So your knowledge in this result—in this matter is simply the result of asking individuals who may have had some knowledge of the subject?

Ans. Yes, sir, it is arrived at by that method and from inquiry from men who are practical in those things.

Q. You would not claim that Geo. H. Emerson is a boom man?

Ans. Well, perhaps he may have some data.

Q. You would not say that Clyde Weatherwax was a boom
20 man?

Ans. He was the secretary of a boom company for a great many years.

Q. Distinctly an office man was he not?

A. Yes, I presume he was, but had made some observation, and had access to the records.

Q. The Chehalis boom is constructed on an entirely different basis than this boom. It is different in its construction, is it not?

Ans. Well, in some respects it is different.

Mr. ABEL: We make the objection without cross examining the witness any further.

COURT: I do not attach much importance to the answer of the witness in regard to his having any experience, but he may answer the question as to his actual figures.

(Mr. STRATTON, continuing:)

Q. (Question repeated by stenographer.) Now what, if you know, would be the catching capacity of a boom per acre?

Ans. In figuring out a basis for estimating the catching capacity I have made allowance and taken into consideration several things, figuring out first the theoretical maximum, and then making allowance for all sorts of conditions as to the logs, and other things that go to make up or take up space, that would be occupied by logs in a boom—such as drift, and that the logs would not occupy the actual space that the boom would contain: and it takes about three acres to a million feet. There are cases, isolated cases, in which one might find as much as half a million feet of logs, and again I suppose there are places where you would not find more than 100,000 feet perhaps.

21 Q. Now, what do you consider a fair catching capacity per acre of the Nicomen boom, of logs, such as those coming down, one with another, from the country which is tributary to North River?

Mr. ABEL: We object to that, as the witness has not shown himself qualified to answer, nor to have sufficient knowledge of the conditions attending this particular locality to answer that question.

COURT: I think that you are certainly encumbering the record, and taking up a good deal of the time of the court with this line of testimony, but you may proceed.

A. Why, I don't see any reason to change my estimate. In my estimate I have said that at times there might be more to the acre than at others. It would all depend upon the size of the logs. The North River country—or the timber tributary to North River is made up of small and large logs—in making my estimate I take into consideration a great many of those problems.

COURT: What is your answer in regard to North river? I think the question was as to the catching capacity per acre.

A. Well, I put them all in a general field, and apply that estimate to the whole general subject of booms.

Q. And that question is applicable to the logs that come down North River?

Ans. Yes, sir.

Q. You may examine this document which I show you, the same being marked "Plaintiff's Exhibit 'B' " in this case, and I will ask you if you have ever seen it before?

22 A. Yes sir, that is a map of North river, and it appears to be an official document of some kind.

Q. What kind of an official document is it, if you know?

A. Well, I don't think that I am here to identify any official documents for the war department.

COURT: It speaks for itself does it not?

Mr. STRATTON: Well then, I will withdraw that question.

Q. Can you take this map and compute the water area in the boom between low tide and that portion of the boom that covers North River exclusive of the slough?

COURT: You are speaking of the old boom?

Mr. STRATTON: Yes sir.

A. Why yes.

COURT: You are asking for the water area of the old boom?

Mr. STRATTON: Yes sir.

Mr. ABEL: We object to the witness giving the area of the boom by reference to the exhibit, for the reason that the correctness of that plat has not been shown.

Mr. STRATTON: We will proceed then to show that it is correct.

Q. And did you have anything to do with the setting or fixing the lines for the Nicomen boom as it is now constructed?

Ans. Yes sir, I had to give the lines on which those tangents were driven for the boom.

Q. Now, from having made, or ascertained the lines your-

23 self from a survey, and from that map that is drawn to the scale, can you ascertain the number of acres that is in that?

Mr. ABEL: That is objected to as assuming a fact not shown to exist.

COURT: Let the witness answer and you can cross examine him later.

A. Why, yes, I can take this and figure out the area of this plat.

Q. The plat shows on its face, does it not, that it is drawn to the scale, and that it is a government map certified to by the secretary of war?

Mr. ABEL: We object to the counsel stating that it is a government map.

Mr. STRATTON: I think it purports to be a government map.

COURT: The instrument speaks for itself and that can be argued to the court.

A. How close do you desire.

Q. As close as you can draw it, Mr. Clapp.

COURT: Are you including the capacity of the slough?

Mr. STRATTON: No sir, between the low water and the boom sticks.

A. About thirteen acres.

Q. What is the capacity of that boom at high water?

A. About six million feet.

Q. How many acres?

Ans. Seventeen acres.

Q. Well, I will ask you, and I think I have not asked you before, what the capacity was at low water? You may state what
24 the catching capacity of the boom is at low water.

Ans. Between four and five million feet.

Q. Now, what is the water area of the capacity, the catching capacity between low water mark and the boom of the proposed extension? I am asking for the area and the catching capacity.

Mr. ABEL: We object to the witness testifying, as he has not shown himself capable of testifying to that matter.

COURT: The objection will be sustained.

Q. Mr. Clapp, do you know the location of the proposed extension or enlargement of the Nicomen boom?

A. I know that some years ago there was a boom built in North River, the Nicomen boom, and that the general plan of the boom was submitted——

Mr. ABEL: We object to the witness continuing his answer, as not responsive to the question. The question is as to whether or not he knows.

COURT: You can point it out on the map. It is claimed that this covers the proposed improvement, so let the witness figure it out.

Mr. STRATTON: I want him to show that he does know this addition or extension, and that is why I asked him what I did.

COURT: His answer is not responsive, and he goes way back of the question. He may answer whether he does or not.

A. Yes sir.

Q. You may state its location. You may say how you know.

25 Mr. HEWEN: We object to the form of the question.

Mr. STRATTON: I will withdraw it, but not with the idea that I will not again. I shall insist on the question later.

Q. Assuming that the location of the proposed extension is further represented by this red line that I point out to you, you may state what the water area of the proposed extension is between the outer structure of the boom and low water mark.

Mr. ABEL: Now, may it please the court, I wish to make an objection to the use of the plat, and also to its admission in evidence, for the reason that it shows an alteration by a red line on the blue print. Your honor knows how a blueprint is constructed, and here comes a blueprint from the secretary of war with red lines which would not be there in its original condition. They have been put there later, and we demand an explanation before that is admitted in evidence, and if that is not given, we ask for permission to send for and file a new plat. If the records in Washington are locked up so that we can't get at them, we shall certainly want to know how that red line got there.

COURT: You offer that as being in the condition it was when furnished by the department?

Mr. STRATTON: It is in the exact condition it was when we received it.

26 COURT: The court will not presume any alteration unless there is proof.

Q. (Last question repeated by stenographer.)

A. Well, between twenty and twenty-one acres.

COURT: At low or high water?

WITNESS: At low water.

Q. What then is the fair catching capacity of this twenty acres?

Ans. Well, based on my way of estimating it, it would be about seven million feet.

Q. What is the water area of the extention between the outer structure and high water, if you are able to ascertain it from that map?

Ans. Well, as I recall the high water and low water as shown here, at that particular part of the river, it is very close, so that there is not much difference in the water.

Q. Practically the same?

Ans. There is very little; perhaps it may increase it some.

Q. Again showing you plaintiff's exhibit "B," please ascertain the acreage of the boom in the slough from bank to bank.

Mr. ABEL: We make the same objection as before that there is no proof of the correctness of this plat, and the further objection that there is nothing to ascertain what part comprises the boom. There is a long slough there, and there is nothing to show how far up it extends.

COURT: There should be some showing as to the extent of the boom. The court will say, that while he is admitting this

27 testimony, that at the close of the testimony I will hear counsel on any objection that they desire to argue.

Mr. ABEL: We do not desire to argue it now.

COURT: I do not want it to be understood that by admitting this testimony, I am overruling any objection that counsel makes.

Q. (Last question repeated by stenographer.)
A. About twenty acres.
Mr. HEWEN: That is, slough acres?
A. Yes, that is altogether.
Q. Do you know what the rules of the war department are with reference to application for permits to put in structures in navigable waters in the United States, such as boom structures?
A. Yes sir.
Q. And do you know whether or not plans must be submitted of the proposed improvement?

Mr. ABEL: We object, as not being the best evidence.
COURT: It would seem that the rules would be the best evidence.
Mr. ABEL: We make the further objection that the question must be divided.
COURT: Are you offering to show what the improvements are in this regard.
Mr. STRATTON: They have intimated that this has been altered.
COURT: The court will not consider it unless there is some proof offered as to the alteration.

28 Mr. STRATTON: I am simply attempting to show how the red lines were put on there or at least this red line was on there, when the certificate was attached, at the time of the signing of the certificate by the war department. I simply want to show that he knew what the rules were.

COURT: You are asking for rules in general. As I understand it you want to show by the witness that it is the practice to put red lines on papers of this kind.

Q. I will ask the witness, assuming that this is a plat to which the secretary of war has attached a certificate, and which certificate is attached to the plat, explaining the presence of the red lines in North river.

Mr. ABEL: We make the same objection, as the witness has not shown that he knows anything about it.
COURT: He may answer if he can explain. I do not think it is necessary to go into that phase of the case, anticipating a proof that is not before the court, but he may answer the question.

Q. (Last question repeated by stenographer.)
A. From the knowledge that I have, I should say that the red line indicated some improvement that was contemplated at the time that the plat was filed, if this is the plat that was filed with the secretary of war.
Q. How do you know that the red line indicates what you have just said it does?

29 A. It might have been referred to as some construction in the colored line, and if that was the case it would appear in the red line in the blueprint, as well as the tracing that goes to the war department. In blueprints all black lines print white.

Q. When two classes of improvements are proposed by a plan, are those two classes in the same color of lines on the plat?

Mr. ABEL: That is objected to as being leading.

COURT: He may answer the question.

A. Not at all,—not always. They may be distinguished by letters, or they may be colored.

Q. State whether or not you know, from conversations had with Mr. P. J. McGowan, president of the plaintiff company, on statements made by him at or about the time the company was organized, and the plat filed in the office of the secretary of state, whether or not it was the intention of this boom company to extend its boom above what is marked on plaintiff's exhibit "B" rudder boom?

Mr. HEWEN: We object to any evidence as to intention, as being incompetent, irrelevant and immaterial.

Mr. ABEL: We would make the further objection that it is hearsay, if your honor please.

COURT: It would be clearly hearsay, if he was not a part of the company.

Mr. ABEL: We would make the further objection that it
30 is a self-serving declaration.

COURT: He may answer. The court is not passing at this time upon the materiality of the testimony.

Mr. HEWEN: Then it will be understood that we object to all this kind of testimony?

COURT: Yes sir.

Q. (Last question repeated by stenographer.)

A. Yes, I know.

Q. You may state what Mr. P. J. McGowan said to you at those times with reference to the extension of his boom.

Mr. ABEL: We would make the same objection; also that the time, place, persons present not being given, and testimony being admitted in accordance to the objections already made.

COURT: The same ruling may apply.

A. Why, Mr. McGowan wanted to have a boom constructed in North river that was wider; that is, with a wider area than we were willing to pass upon, and I told him that I would not pass on the one he wanted. Then he wanted to build it, narrowing it further up the stream. I told him that I would have no objection to that. He said that he would—or the boys on the river at that time would not guarantee the building of the whole scheme.

COURT: Who were you acting for at that time?

WITNESS: Who was I acting for at that time?

COURT: In what capacity?

WITNESS: As an official for the United States Government.
31 (Witness continuing:) And he said he would build the lower part of it, and I said there would be no objection to his building or extending his boom as he had talked to me about. He said he would build the lower part now, and when the logging business warranted it, that he would extend it up to the limits, as shown

on that map, or up to the point way above that. That is how I made my conclusion, that it was his intention to build it that way.

Q. You say there are twenty acres of the slough. How much of the slough have you taken into consideration in finding that area?

Ans. Why, practically all of the slough where it—where it narrows perceptibly.

Q. Let us mark that with a letter "A."

A. (Witness does so.)

Q. And from the letter "A" extending downward to the mouth of the slough?

Ans. Yes sir, where this shore would meet the other shore line of the slough.

Q. Do you know what the tide in North river is—what is the rise and fall of the tide in North river at the location of the present boom, as operated by the plaintiff?

A. The tides as I have observed them at that place, fluctuate about nine feet.

Q. That is, that there is nine feet between high and low water?

Ans. Between a fairly low tide and a fairly high tide.

Q. What is the rise and fall of the tide in North river where the proposed extension is?

Ans. Well, it is very nearly the same thing——

Q. Do you know anything with reference to the currents
32 in North river where the proposed extension is, and where the defendant has constructed a boom?

A. I have never made any observation except general observations—it is simply an estimate as to the current there. I suppose you have reference to the velocity of the current.

Q. Yes. Where is it the swifter—on the left bank or on the right bank?

Ans. There is more current on the right hand side of the stream coming down, than there is on the left hand side.

Q. Why is that?

Ans. Well, you find the current there—the water, the deep water. It shows it by the soundings. The concave side of the bend of a river is always deeper, there is a greater velocity of water there than there is on the convex side.

Q. Is the North river at the place where all of these proposed extensions are located controlled by the exercise of the jurisdiction of the United States Government over them?

Mr. ABEL: We object to that, as being incompetent, irrelevant and immaterial, and as calling for a conclusion of the law; the witness not showing himself qualified to answer.

Q. State whether or not you were in the employ of the government when you were removing, or had removed, the jam—state whether or not you were doing that on the orders of the government?

A. In North river?

Q. Yes sir.

Ans. All the work I did there was under the instruction of
33 my superior officer.

Q. Do you know of any other work done on North River through the war department of the United States?

A. Only the supervision over the river to see that there were no obstructions to the navigable waters of the river. That is all I know of.

Cross-examination.

By Mr. ABEL:

Q. Mr. Clapp, when was it you acted for the government in respect to the Nicomen boom?

Ans. It was on several occasions.

Q. You may state the occasion.

Ans. You mean while it was Mr. McGowan's scheme as well as the Nicomen Boom?

Q. No, I do not. Did you build that boom, Mr. Clapp?

A. No, I did not build it.

Q. Did you have any part in building it?

A. No, not in building the boom.

Q. Were you connected with Mr. McGowan in any way whatever, or with the Nicomen boom in any way whatever, in the building of Nicomen boom?

A. I gave Mr. McGowan a plan of the rudder boom and also gave him a plan of the standing boom showing the assembling of the piling to be used in the construction of that boom.

Q. When was it you did that?

Ans. It was just prior to the building of that boom.

Q. Were you at that time in the employ of the government?

Ans. Yes sir.

Q. In the same capacity as now?

Ans. Yes sir.

34 Q. Acting for the government with respect to the same matter at that time?

Ans. No.

Q. When did you first act for the government with respect to that matter?

Ans. Just at the time of their building I gave the lines upon which they were to build.

Q. To whom?

Ans. Well, it was for the company that was building the boom.

Q. Now, what I want to know is this; whether you were acting for the government or for Mr. McGowan or the Nicomen Boom Co., at one and the same time respecting the same matter?

Mr. STRATTON: We object to that as being incompetent, irrelevant and immaterial.

COURT: I understand him to say that he furnished this information to the McGowan Co.,—or that at the time he furnished this information to the McGowan Company, that he was not acting for the government at that time, although he was in the employ of the gov-

ernment. The matter has an open question in it;—Mr. Clapp is not on trial here for any misconduct on his part.

(Exception taken.)

A. At the time this was laid out I was in the employ of the United States, and I also gave the points for the construction—the angle points for this boom built by Mr. McGowan.

Q. Did you receive any compensation from Mr. McGowan or the Nicomen Boom Co. for those points?

Ans. No sir.

35 Q. Did you receive any compensation?

Ans. No sir, I received no compensation, as I had no contract with Mr. McGowan—but later I did receive compensation.

Q. What did you receive?

Mr. STRATTON: That is objected to as being incompetent, irrelevant and immaterial.

(Objection sustained. Exception taken.)

Q. When did you receive this compensation?

Mr. STRATTON: We make the same objection.

COURT: He may answer that question.

A. I don't just now remember, but I think it was some time about December, 1900.

Q. Were you subpœnaed in this case, Mr. Clapp?

A. Yes sir, I was.

Q. And brought here in obedience to a state subpœna?

A. I came, yes sir. I tried to stave it off and not come at all, but the attorneys came after me and got permission of my superior officer, and that is the reason that I am here. It was through no choice of my own—I have no desire to be here.

Q. Are you interested at this time, or have you been brought into this case in any other way than a mere witness for the plaintiff?

Ans. That is all, sir.

Q. Did you wire to Mr. Hunt from Seattle, or telephone him to Aberdeen, to come over here immediately, upon the bringing of this suit?

Ans. I did not when the suit was brought, but I wired Mr. Hunt—and I also telegraphed him.

Q. Were you acting as a witness then in soliciting expert evidence for the plaintiff?

Ans. I did not finish my answer, Mr. Abel. I did wire,

36 as I said, to Mr. Hunt, for this reason.

Q. I don't care why you did or did not. What I want to know is whether you did or not.

COURT: The court thinks that the witness may answer if he did, and if he did he may explain.

A. I was at Gray's Harbor on the 14th of October and went to Seattle, and on my arrival in Seattle I met Mr. McGowan, and he said that he wanted to get a surveyor to make some surveys at South

Bend, and he asked me about somebody to do the work—he wanted me to recommend somebody.

Mr. ABEL: We do not care for any hearsay evidence your honor.

COURT: I presume that your inquiry was for the purpose of showing some special interest in this litigation, and I think it only fair to him that he should be allowed to explain the circumstances under which he may have telephoned this party.

(WITNESS continuing): And I recommended Mr. Hunt, among others, to Mr. McGowan, and at his request I telephoned him. Mr. McGowan was an aged man, and I simply did it at his request.

Q. What day?

Ans. I think it was the 14th day of October. It was at the time that the board of engineers was at Gray's Harbor, and it was immediately upon my return to Seattle. I think it was on the 14th of October.

Q. Wasn't it earlier than that?

Ans. I don't think it was. I would not like to state because I haven't those dates.

37 Q. Did you solicit any other evidence on behalf of the plaintiff in this case?

Ans. No.

Mr. STRATTON: We would object to that question, for the reason that it is assuming that he had solicited evidence in this case, when there is nothing whatever to show it.

COURT: The court understands that. The question assumes that.

Q. Do you know Mr. Brace of Seattle?

Ans. Yes sir.

Q. Did you request that he go as a witness in this case for the plaintiff?

Ans. No sir.

Q. Do you know him?

Ans. Yes sir.

Q. Did you secure his attendance here?

Ans. No sir.

Q. Did you talk with him about the case?

A. I talked with him generally about the case, but he didn't know what case I was talking about, and if you will allow me to explain——

Q. I don't care for the whole thing. I want to know whether he came to you or you went to him?

Ans. I did not go to him to solicit his evidence.

Q. Did you go to him or he to you?

Ans. I cannot answer that question either yes or no in justice to myself.

COURT: He has answered that he did not solicit Mr. Brace.

WITNESS: I am willing to answer the question and explain in justice to myself, just how I spoke to Mr. Brace at all.

Mr. ABEL: We are not here to justify you or condemn you.
38 COURT: That is not the question, gentlemen.
Mr. ABEL: I submit that the question calls for an answer either yes or no.
COURT: You are assuming that he had talked with Mr. Brace about his being a witness in this case. I understand him to say that he did not speak to him about that subject. If you want to burden the record with all this, he may answer, and he may also explain.
Mr ABEL: We would like an objection.
COURT: Exception may be allowed.

Q. Go ahead now.
Ans. I went to Mr. Brace for information, for the reason that we received a letter from Mr. Stratton, telling me that he understood that I had some knowledge of the capacity of Mr. McGowan's boom on North river, and that he would like to know what the capacity was of a certain part of the boom and also of another certain part of the boom. I already had fixed my estimates, and had used for years a certain basis for estimating, and to verify my own work I wrote to two or three parties, and I went to Mr. Brace.

Mr. ABEL: We think, your honor, that we should not have the burden of all this testimony in the record.
COURT: Let the witness say simply whether he first spoke to Mr. Brace or Mr. Brace to him.

A. I spoke to Mr. Brace first for the information on this subject.
Q. When were you last on North river?
Ans. The latter part of 1900.
Q. How often have you been upon the river at all?
39 A. A great many times—I could not answer just as to the exact number of times——
Q. A dozen times?
Ans. I presume that I have.
Q. Did you say that you worked in Brooklyn on the river?
A. I don't know that I said it, but yes, that is the post-office.
Q. How far is it from the Nicomen boom?
Ans. Well, it is probably forty or fifty miles up the river.
Q. How did you go down the valley from Brooklyn?
A. Took the river part of the way, and part of the way crossed the peninsular, and walked that part of it.
Q. Did you have a canoe?
Ans. I had a boat—a row boat.
Q. Where did you get the row boat?
Ans. I got it in South Bend.
Q. You took it up the river?
Ans. I took it up across the divide into the North river country.
Q. Now you spoke a while back about a jam that had been in North river for a great many years. Have you any idea how long it was in there?
A. Well, from an old settler, Mr. Wilson, an old settler that lives at Willapa, I learned that it had been there since his knowledge of this country.

Q. It was there at that time?
Ans. Yes sir.
Q. It may have been there several centuries?
A. I would not like to say. It had been there for a long time though—and it would be a hard thing to estimate the exact length of time, but it had been there some years.
40 Q. How far above the disputed area of these two boom companies was that jam?
Ans. Practically between five and seven miles up the river above the mouth of North river.

COURT: Do I understand that this jam was above either of these booms?
Mr. ABEL: Yes, I wish merely to show that it had no connection with it at all.

Q. Now, you don't know of your own personal knowledge what the actual condition is as to the boom, or either one of these booms at the present time?
Ans. No sir.
Q. You have not seen the Nicomen boom for about three years?
Ans. No sir, I have not seen it since it has been operated.
Q. You haven't seen it since it was built?
Ans. No sir.
Q. You don'- know how far up the McGowan slough it extends?
Ans. Why, the constructions are in the river, and not in the slough.
Q. That is your idea about it—that there is no structure up the slough?
Ans. I believe there are a few piles.
Q. Do you know of your own knowledge?
Ans. Yes sir.
Q. Were there any there the last time you were there?
A. Yes, that I remember of now, but I would not state what might have been placed there since—whether more or less.
41 Q. Did you prepare this plat which is plaintiff's exhibit "B"?
A. I prepared a plat, but I did not prepare that plat.
Q. Did you prepare the original of which this is a blue-print?
Ans. No, I did not. I prepared the original from which the tracing of that is the duplicate.
Q. I ask you for an explanation of what is referred to by the mark which is designated on the blueprint, "Proposed cut?"
Ans. Mr. McGowan desired to have his boom in the slough, and desired to cut out a channel from the North river, to the slough at this point.
Mr. ABEL: We would like you to show the court, because we consider that quite material in this case.
(The court's attention is called to the upper part of the McGowan slough, so designated on the map.)
COURT: That is in the river itself?

Mr. ABEL: No sir, it is merely a large slough, extending up a mile or two.

Q. Now what is meant by that proposed cut?

Ans. Mr. McGowan desired to submit a scheme to the government for deepening the river to run his logs in this way—not to occupy the river—to go through the slough instead of around in the river.

Q. That was the idea in discussing the proposed cut?

A. Yes, that is one of the things that he asked permission for.

Mr. STRATTON: Did he get it?

WITNESS: No sir.

Mr. ABEL: We move to strike the question and answer
42 as being improper. The witness has not shown himself qualified to answer counsel—and counsel has no right to ask the question.

COURT: It may be stricken for the present.

Q. Did you have any part in making the plans submitted to the secretary of war for the Nicomen Boom Co.?

A. No sir.

Q. Were they not referred to you for acceptance or rejection?

Ans. They were referred to me, and I was asked if, in my opinion, that would be an obstruction to navigation, and I said that there would be no objection except regarding that proposed cut-off, which I ruled against. I recommended that it should not be allowed—that the cut should not be allowed.

Q. Did you do that in writing?

Ans. Yes sir, it is a matter of record.

Q. Are you prepared to state what the secret records of the war department disclose upon matters which come up before you for official action, Mr. Clapp?

Mr. STRATTON: That is objected to as being incompetent, irrelevant and immaterial.

(Objection sustained.)

Mr. ABEL: We move to strike the answer as not responsive to any question, and as being incompetent.

COURT: It may stand, and it will be considered by the court later.

Q. Have you ever been a stockholder in the plaintiff corporation?

Ans. No sir, not to my knowledge I have not been.

Q. Now, Mr. Clapp, you have stated that you recommended
43 that the proposed cut be not allowed by the war department. Do you remember a conversation with myself in 1900 concerning that proposed cut?

Mr. STRATTON: We would suggest that the time, place and circumstances have not been called to the attention of the witness.

COURT: Is that question asked as a ba[illegible] for impeaching testimony?

Mr. ABEL: It might result in that, your honor—I simply wish to know whether he recalls that.

COURT: If it is for the purpose of impeachment, you should indicate the time, place—so that he may identify the location.

Q. Do you recall a conversation at Hoquiam in the fall or summer of 1900 between yourself and myself—I will say in the spring of 1900, in which the matter of the proposed cut in North river into McGowan slough, as indicated on the blue print, was under consideration, and you said that it was entirely feasible, and that if it came before you for official action or consideration that you would recommend that to the war department?

A. I do not recall such a conversation, and no such conversation ever existed of that nature.

Q. You never had such a conversation?

Ans. No sir, I never had a conversation with you or any other man where I recommended that cut.

Q. Have you a copy of that recommendation with respect to that cut?

Ans. No sir.

Q. Are they at Seattle?

44 Ans. They probably are; I don't know. If you made application to Major Millis you might be able to find out.

Q. Have you the figures which you used in arriving at the result as to the capacity per acre of the boom area, under these respective scales?

A. Have I the figures?

Q. Yes, the figures you used in arriving at it.

A. The acreage capacity or the boomage capacity?

Q. The acreage capacity.

Mr. STRATTON: Do you mean the *sot*rage capacity?

Mr. ABEL: I will ask it again.

Q. Have you the figures which you used?

A. I don't know. I have some of them, and some of them I have throwed away, I think. I have the last, the last one.

Q. Will you explain in detail how you arrived at the conclusion which you reached?

Ans. Yes sir.

Q. Just explain to the court.

Ans. Well, the slough measures from its junction with the river up-stream to the point that I indicate, according to the rough scale that I had—it was about 5,000 feet.

Q. That would depend upon the correctness of the blue-print as to the scale?

Ans. Yes, the correctness of it—it would not be very much—and then I gave it an average width of 180 feet.

Q. Did you ever measure that slough?

Ans. I surveyed it.

Q. Have you your survey notes?

Ans. No sir.

Q. Where are they?

Ans. I don't know where those——

45 Q. Did you take that from the blueprint and estimate—was the estimate placed on the blueprint, or from your recollection?

A. From the print.

Q. You take an average width of 180 feet you say?
A. Yes, it is now narrower at some points and wider at still others. The average width is about 180 feet for its entire length.
Q. With respect to the river, did you do that the same way?
Ans. I did, yes sir. I had daylight when working with the river, and this was done by lamp light, and there might be some little difference.

Redirect examination.

By Mr. STRATTON:

Q. I think you stated on cross examination that you prepared a plat from which a tracing was taken, just like the blueprint, which is plaintiff's exhibit "B?"
A. I prepared a plat, and a tracing was made of the original, and this is a copy—this print is a copy.
COURT: That is, a tracing was made from that plat, and this a copy of that tracing—Is that the idea?
WITNESS: Yes sir.
Mr. STRATTON: Now, on the original, which you made, did the red line appear, showing the proposed extension of the boom?

Mr. ABEL: That is objected to as not being the best evidence.
COURT: He may answer.

46 A. It did not appear in red on my own; no, sir.
Q. How did it appear?

Mr. ABEL: We object to that, as it is assuming that the line did appear.
COURT: He may answer, and the court will waive any on the original plat.

A. They were indicated in pencil.
Q. State whether or not it showed the proposed extension.

Mr. ABEL: We object on the same ground as before.
COURT: Objection will be overruled.

A. There was a line on there which indicated the proposed extension.
Q. Now, you also state you were compensated by Mr. McGowan. Now state whether or not when you assisted Mr. McGowan in these matters there was any agreement or whether or not at any other time there was any agreement between you and Mr. McGowan and the Nicomen Boom Co., or anyone else, that you were to receive any compensation whatever for the assistance that you rendered?
A. No sir, there was no talk of it at all. There was not a syllable about it.
Q. State whether or not you expected to receive compensation for what you did?
A. I never gave the matter a thought.
Q. How did it happen that you were compensated?
A. Why, after the boom was constructed, and some time afterward,

I was asked if I would accept some shares of stock in the company. I refused to do so.

Q. You refused to do so?

Ans. Yes sir, I refused to do so. It might have been a
47 paying proposition, but my experience with stock companies had not been such——

Mr. ABEL: We object to that, if the court please.

Q. You may state now how it happened that you were compensated.

A. I presume that Mr. McGowan thought probably that I was deserving of being compensated for working up the scheme for his rudder, the details of it, and for the details of the dolphins encompassing the boom.

COURT: Did he offer you the compensation, or did you ask him for the pay?

WITNESS: I never asked him for pay at all, your honor.

Q. Did you expect to receive any?

Ans. No sir.

Q. Was the plat which was filed in the office of the secretary of state made after the actual survey by yourself of the river there?

A. A map filed with the secretary of state?

Q. Did you make a survey of the river here, and was the plat made from the survey?

Ans. I don't recall anything of that kind. I have a recollection that the plat was made from notes that were obtained from the surveyor general's office.

Q. Do you know whether or not permission was given to Mr. McGowan by the war department to cut a channel at the upper extremity of the slough, attaching the slough to North river?

Mr. ABEL: We object to that as not being the best evidence,
48 and as being incompetent, irrelevant and immaterial.

COURT: You are not claiming that you had any permission, are you? The objection will be sustained. You are getting enough into the record.

(Exception taken.)

Mr. STRATTON: I think when they open it that we should have a right to go into it ourselves.

COURT: Objection will be sustained.

(Exception taken.)

Recross-examination.

By Mr. ABEL:

Q. What work did you do for the Nicomen Boom Co. or Mr. McGowan besides furnishing plans for the rudder and the dolphins?

Mr. STRATTON: That is objected to as being incompetent, irrelevant and immaterial. The matter has been gone into on direct examination.

COURT: It seems to me that you are putting a great deal of matter into this record. The objection will be sustained.

(Exception taken.)

Q. State whether or not you made a survey for Mr. McGowan for the proposed Nicomen boom in the year 1900 while you were an official in the war department.

Mr. STRATTON: That is objected to as being incompetent, irrelevant and immaterial.

(The objection is sustained.)

COURT: This matter has been gone into and the witness has
49 testified fully in regard to it.

Q. I will ask you how many days work you done for Mr. McGowan or the Nicomen Boom Co. in this matter.

Mr. STRATTON: We make the same objection.

COURT: Well the witness may answer if he knows.

A. Well, I don't know, Mr. Abel, how many days. I never worked on it by the day—or for days at a time for Mr. McGowan. I put in some spare time when I could get at it. It was one of those problems that require some thought and it would be a difficult matter for me to state any amount of hours or days that I gave the matter consideration.

(Witness excused.)

Mr. STRATTON: We desire to offer in evidence and read the deposition of Mr. J. S. Brace, taken at Seattle. (The same is read in evidence.)

50 E. G. HUNT being a witness on the part *of the part* of the plaintiff after being first duly sworn, testified as follows:

Direct examination.

By Mr. JOHN T. WELSH:

Q. Where do you reside Mr. Hunt?

Ans. Aberdeen, Wash.

Q. What is your profession?

Ans. I am a civil engineer.

Q. How long have you been a civil engineer?

A. About twenty years.

Q. I will ask you if you have any interest in the result of this action?

Ans. No sir, I have not.

Q. State what experience you have had, if any, relative to planning booms and estimating the capacity of booms in southwestern Washington.

Ans. I have made surveys for a number of booms in Chehalis county—planned the construction of them and made estimates of the amount of timber that would be held by such booms. I don't remember just how many of them, but several of them.

Q. Are you, or have you ever been on North river in this county?

Ans. Yes sir.

Q. What kind of a stream of water is that empties and flows into

the tide water—or state whether it ebbs and flows up the stream for some distance?

Ans. The tide ebbs up the stream for some distance. I am not familiar with the distance that it does ebb or flow.

Q. Do you know the point on the river where the river intercepts with the north line of section 23?

Ans. Yes sir.

Q. Do you know whether the tide ebbs and flows that far
51 up?

Ans. I suppose that is in the township in which the boom is located?

Q. Yes, the same township and range in which the boom of the Nicomen Boom Co. is located.

A. Yes sir.

Q. Did you ever make a plat of a portion of this North river?

Ans. I did.

Q. I will ask you if that is the plat? (handing witness paper.)

A. Yes sir, that is the plat I made.

Q. I will ask you, if that plat, as far as it goes, is correct?

Ans. Yes sir, the plat correctly represents a survey made by me to determine——

COURT: That is all in evidence?

Mr. WELSH: Yes, your honor, in the injunction proceedings, but not in the trial of this case.

Q. Do you remember what month and year it was that you made this plat?

Ans. I made it in September of this year.

Q. Do you remember what day of September?

A. I made the survey I think about the 20th day of September and the plat was made a few days afterwards.

Mr. WELSH: The plat which I have shown the witness I now offer in evidence as plaintiff's Exhibit G.

COURT: The purpose should be shown.

Mr. WELSH: It is for the purpose of showing the proposed extension.

COURT: It may be admitted.

52 COURT (*continuing*:) It is understood that the affidavit is not part of the testimony.

COUNSEL: Yes, your honor.

(Same is received in evidence and marked "Plaintiff's Exhibit 'G'").

Q. Have you ever had charge of the booming of logs?

A. Yes, sir, I have.

Q. In what capacity did you have charge—as superintendent or otherwise.

Ans. Yes, sir, as superintendent.

Q. When was this, Mr. Hunt?

Ans. In 1896.

Q. Where was that?

Ans. In the East Hoquiam river, in Chehalis county.

Q. Did you observe the size of the timber of North river in the vicinity of the river while you were there?

A. Not while at the mouth of it.

Q. Have you at other times?

Ans. I have often been on North river above that point in Chehalis county.

Q. Have you observed at those times, or any time, the character and quality of timber as to size?

A. Yes, I have cruised timber in that vicinity.

Q. How did it compare with the timber in Chehalis county, as to size, where this boom, on the river, of which you had charge, is located?

Ans. Well, I think the average of the North river timber is a little larger than down on the east Hoquiam. It is not a great deal larger, but probably some.

Q. Have you ever had any experience in estimating or measuring the number of feet of logs in a boom?

A. Yes, sir.

53 Q. Do you know, Mr. Hunt, about how many thousand feet of timber or logs a boom will contain? That is, where the logs come into a boom down the river and are not packed in, but come in of their own accord on freshets?

A. I know approximately, yes, sir.

Q. You may state what quantity would be the catching capacity—what I want to know is the catching capacity of a boom per acre.

A. I would say about four hundred thousand feet.

Q. You say that you have cruised timber above these respective booms on North river?

Ans. Yes, sir; I have cruised timber above the line of the Pacific county and on the North river in Chehalis county in several places.

Q. That timber is tributary to North river, is it?

A. Yes, sir.

Q. From the knowledge and experience that you have had and the observations that you have made, you may state about what the boom capacity per acre would be of the timber on North river.

A. About as I have stated—about four houndred thousand feet.

Q. Did you ever see the present boom of the Nicomen Boom company situated in this county? And would your estimate be about as you have stated for that boom?

Mr. ABEL: We would object to counsel leading his witness.

Mr. WELSH: I admit that it is a little leading.

Q. You never measured the boom area, did you, of the

54 Nicomen Boom Co.?

A. From the map is all.

Q. From what map?

Ans. From the blue print.

Q. That which is attached to the certificate from the secretary of war?

Ans. Yes, sir.

Q. You didn't make an actual survey of it?

A. No, sir, not of the existing boom.

Q. Again referring to plaintiff's exhibit "G," what does this refer to—this plat made by Mr. Hunt, what do the red lines indicate?

A. The dotted red line on this map indicates the location of the Nicomen Boom Co.'s boom, according to the plans approved by the secretary of war.

Mr. ABEL: We object to the answer as being incompetent, and to the question for the same reason, and move that they both be stricken.

COURT: I don't know whether the witness would be competent to say whether the plan was approved by the secretary of war.

WITNESS: The plan that I refer to is the plan that was referred to me in locating the boom.

Mr. STRATTON: That is the plan is it?

WITNESS: Yes, sir.

COURT: I do not think that the witness is competent to say that it is approved by the secretary of war.

Q. I will hand to the witness the plaintiff's exhibit "B" and ask when he refers to a map from the secretary of war if he means that to be the one.

A. Yes, sir; that is, that is the map from which I located
55 the boom above the boom as now constructed.

Mr. ABEL: If this is merely a copy, we prefer that the one with the certificate be used. This is encumbering the record.

COURT: I presume that the map now handed to the witness shows something in addition to what is shown by the other.

Q. What do the other dotted lines indicate?

A. Well, the small red circles indicate the points at which I located piles to mark off the line of extension of the Nicomen Boom Co.'s boom. The small circles in brown indicate piles that were driven in the river by other parties. The larger circles in brown show the location of dolphins, composed of about five piles each that were driven in the river at that time.

Q. What is the scale of this map, marked "Exhibit 'G' "?

A. 200 feet to the inch.

Q. Will you state about what the average width of North river is at the points indicated on this map?

Mr. ABEL: We object to the witness testifying about that point because it is not shown that he made the survey. The map of a certain scale is already in evidence.

Q. I will ask you if your surveyed the river at any time?

Ans. I did. I surveyed the river from the upper end of the present boom to the upper end of the proposed extension.

Q. You may state what the width of the river was as you found it to be.

Ans. The average width of the river at those points is about
56 240 feet.

Q. I will ask you if the plaintiff builds its boom up the

river as indicated on that plat, and if the defendants have built their boom as they proposed to build it at the time you were there in September, state to the court how near those spreaders will be together, and give the court an idea of it—just fix the map and show the court how they will be, and if they crowd at any place; just so state to the court.

A. The red line which indicates the proposed line of extension of the Nicomen Boom Company's boom——

Mr. ABEL: May it please the court, we would like to make an objection to this witness testifying that there is such a proposed extension. He is assuming that.

COURT: He states that that indicates the line as shown on the map filed in the office of the secretary of war. He can answer, but unless it is connected in the proof of the case, it will not be regarded by the court.

(Witness continuing:) Well, at the lower dolphins shown in brown on this map, the line of the Nicomen Boom Co.'s boom would intersect the line of the boom which was being constructed, at that time by other parties. And from that point up the river the two lines are approximately parallel with each other. They are at a distance from each other from three or four to ten feet to the sheers. The dolphins are shown in brown, the red line crossing the sheer and extending on up the river beyond. From the lower dolphin shown on this map, about opposite Smith's slough, and the red line
57 practically parallels the line of piles that was driven at that time a few feet to the right of those piles.

COURT: From what point is that?

WITNESS: From this lower dolphin down to the bend, to the left of four and five here, and extending on down to the other portion of the boom, which is now constructed practically parallel with the left bank of the river.

Q. Mr. Hunt, at the time you were there, state how many different parties were driving piling on those lines, if any one?

Mr. ABEL: We would like to ask what date this refers to. We object to it as being immaterial, because after this suit was brought I will say, that the court will remember what I said concerning the issues in this case, that it is alleged that upon a certain date we commenced to drive piling within ten feet of the Nicomen boom. Our contention is that they came in and commenced driving piling across our piling, and I wish it, if this case is to be tried upon what the situation was on that date,—on the date suit was brought, I say that it is immaterial whether defendant or plaintiff were driving piling two weeks later.

COURT: When was this suit brought?

Mr. ABEL: On the 16th day of December.

COURT: Is it not alleged in the complaint that since the
58 commencement of that action this has been done by the defendant company? I don't understand the witness to say who is driving those piles.

Mr. WELSH: I simply asked him how many parties were there driving piles.

Mr. ABEL: To shorten the record we would say that we do not deny that we built this boom. If it is only to show that we have done work since this suit was brought, and to permit merely evidence to show what the situation was when suit was brought and prior thereto, we will admit that.

COURT: So far as that is concerned it would be as to the time of the commencement of this action. I don't see how your driving piles prior to that time, and prior to the commencement of the action would have any right—or would have any bearing on your right there.

Mr. STRATTON: We claim that we filed our plat under the statute, and that we have an absolute right to build our boom there at any time.

COURT: Of course, I understand your claim, and if you worked there without any right to work there it would be material.

Mr. STRATTON: That is the very point, if the court please, that is to be decided by the court, as to that right.

COURT: Not at all, but I understand you are showing your
59 right to be there prior to the commencement of the action, and that you did drive piles on this disputed territory.

Mr. ABEL: Would you state what your purpose is in offering it?

Mr. WELSH: I will withdraw that question and ask another.

Q. When you went there what day was it in September?

A. About the 20th—although I don't remember the exact date.

Q. You found, when you went there, that the Nicomen Boom Company had piles driven, did you not?

Mr. ABEL: That is objected to as being leading.

COURT: Ask him what he did find.

Mr. WELSH: I will withdraw that question for the present, I think perhaps it is a little leading.

Q. Mr. Hunt, if both of those booms are erected what effect will it have upon the navigability of that river?

Mr. ABEL: That is objected to as being incompetent, irrelevant and immaterial.

COURT: The only question is as to whether at the time you commenced to construct your boom the plaintiff had a right to construct a boom in the same territory, and if the construction of your boom would interfere with their right you would be restrained from making such a structure.

Mr. ABEL: That is the question in a nut shell.

COURT: It would make no difference to you if they did
60 not trespass upon some of your rights. I will expect to hear you on that, gentlemen, but not at this time. The testimony may be considered.

Q. I will ask you that question again, Mr. Hunt. If both of those booms are erected what effect will it have on the navigability of that river?

A. Navigation would be entirely blocked.

Q. For what distance wou'd the river be entirely blocked—about what distance?

Ans. Up the whole length of the other boom.

Q. Whose boom?

Ans. I don't know the company's name.

Q. You mean the defendant's boom?

Ans. Yes sir.

COURT: Would the operation of either boom be practical if both booms were constructed as proposed?

WITNESS: No sir.

Q. From your knowledge and experience as a boom man would it be practicable to have two booms on that river parallel to each other?

Ans. No sir.

Q. From your knowledge and experienec and from the observations that you made for the defendant, I will ask you if, considering that the defendant has or does construct a boom as indicated on the plat, plaintiff Exhibit "G," state whether or not it will catch all the logs that come down North river within its boom—whether consigned to its boom or the boom below?

A. Yes sir, it will catch all the logs coming down.

Q. About how close, when you were there, was the lower extremity of the defendant's structure to the other extremity of the
61 old rudder boom of the Nicomen Boom Co.?

Objected to as being incompetent, irrelevant and immaterial.

(Objection overruled and exception taken.)

Q. I will ask you if you know?

Ans. I didn't measure that.

Q. Do you know about how close it was?

Ans. Yes, sir, it was somewhere from three to four hundred feet.

Q. From your experience, and the observations that you made there, if the defendant does construct the boom on the lines indicated on the map known as Exhibit "G," state whether or not they could from that boom deliver to the old boom of the Nicomen Boom Co. logs consigned to it within a reasonable time?

COURT: Who do you mean could deliver?

Mr. WELSH: Why, the defendant, if they could deliver to us logs consigned to us within a reasonable time.

COURT: Would not that be a conclusion for the court?

Court: Well, this is an expert witness and he has had experience he says.

COURT: As an expert witness he should know as to the effect you propose it would have on the booming of logs in that river, but whether your boom so constructed would reasonably delay logs to the plaintiff is something for the court to gather from the evidence.

Mr. WELSH: I will withdraw the question for the time being, your Honor.

62 Q. Which side of the river has the great current, Mr. Hunt?

Ans. At what point?

Q. Where these booms are located, or proposed to be located?

A. The greater current for nearly the whole length that this plat shows, would be from the right bank.

Q. When do logs as a rule come into a boom—during what stage of the water?

Ans. Logs from up stream—nearly all the logs from up the river any distance go into the boom when the river is in the condition of a freshet. Some logs might be put into tide water and would come in at any time.

Q. Now, if those logs would come into this boom on a freshet, from your knowledge and experience as a boom man, and from your observations made on this river, if the defendant does or has constructed a boom on the place on the river as proposed, at what stage of the water could it deliver logs which it had caught, but which were consigned to the Nicomen Boom Co.?

Mr. ABEL: We object to the witness answering that question for the reason that the witness has not shown that he knows—or in other words, the plan of the defendant's boom, nor does he show that he has been there since the same was constructed.

COURT: Well, this is a theoretical proposition. The assumption is that your boom is, or will be constructed along the river, and he has asked him, as an expert, when if logs are caught in that boom in a freshet time they could be delivered to the lower boom—at
63 what stage of the tide. If he knows he can answer the question.

A. Logs going into the upper boom in a freshet would necessarily have to remain in the upper boom until the freshet receded enough for the flow tide to have an effect on the current. It would be impracticable to sort logs unless there is a flow tide, and whenever the freshet receded to the extent that the flow tide would take the current up the river, the logs could then be sorted and delivered to the lower boom.

Q. Do you know how long it would be after a good sized freshet, when those conditions would exist, so that the logs may be delivered?

A. No sir; that is impossible to say how long it would be.

Q. Can you tell approximately?

Ans. It might be any time—that is from half an hour to several weeks. It would depend upon the water and how long the freshet lasted.

Q. Mr. Hunt, you say that you made a survey of that river up to what point; did you say that it was where the river, North river, intercepts with the north line of section 23?

A. I could not say that it was to that particular point, but about to that place.

Q. On this plat you may state as to about how far the proposed extension extended—how far up the river? You may use plaintiff's Exhibit "B."

A. About a mile and three-fourths.

COURT: From where?

64 WITNESS: From the upper end of the boom as constructed at the present time.

Q. I will ask you to examine this exhibit "A"—the plaintiff's Exhibit "A," and you may state whether or not the whole extension of the plaintiff was in the waters covered within that plat?

Mr. ABEL: We object to the question because it contemplates the extension of the boom—and not a proposed extension.

COURT: I think the question should be modified. It is not claimed that this is a matter of fact.

Mr. WELSH: That would probably be better to use the word proposed—prior to the word extension.

Q. Mr. Hunt, have you ever made any plans for booms in this state?

Ans. Yes sir.

Q. Have you, from your knowledge and experience as a civil engineer, and also as a boom man, and your experience with booms, state whether or not it becomes necessary by reason of an increase in business to enlarge and extend booms over the intended plan?

Mr. ABEL: That is objected to as calling for a conclusion, and also as being argumentative.

COURT: It would seem to call for a conclusion.

Mr. WELSH: It is in the way of expert testimony. It is a hypothetical question.

COURT: The question is too indefinite and calls for so many

65 assumptions that I think it should be excluded.

Cross-examination.

By Mr ABEL:

Q. No, you say you have been superintendent of one company—was that Mr. Nelson, in 1896, or was that the North Pacific company?

Ans. No, sir, I was superintendent of no company. I was simply superintendent on a boom, for the company—for the North Pacific Boom Co.

Q. How long were you there?

Ans. Three months.

Q. The company quit business at the end of that time did it not?

Ans. No.

Q. The company is defunct, at this time?

Mr. STRATTON: We object to that.

COURT: Counsel will not ask questions unless they figure in this case.

Q. Now, the fact is, so far as the North Pacific Boom Co. is concerned, the conditions were entirely unlike the conditions in this case—the logs went into that boom, or were sent there by artificial freshets, by the use of dams, were they not?

Ans. No sir; they came on tides; came out of another boom into that one.

Q. What boom?

Ans. The east Hoquiam boom.

Q. They were put in there by the use of artificial freshets you say?

Ans. They were splashed from the upper river into tide water by the use of dams.

Q. Have you ever been upon lower North river on any other than the one occasion?

Ans. I have been at this boom.

Q. One occasion, only, and that was after this suit was
66 brought—you were there at the request of Mr. McGowan and Mr. Clapp?

Mr. STRATTON: There is no evidence here that it was at the request of Mr. Clapp.

Q. You came over here to South Bend at the request of Mr. Clapp, did you not?

Ans. Not at the request of Mr. Clapp; no sir.

Q. You had a telephone message from Mr. Clapp, did you not?

Ans. I came over on a telegraphic communication from Mr. Clapp that parties in South Bend were particularly anxious to get my services immediately.

Q. And you came over, and then went over to North river and made an investigation which has resulted in you being present as a witness here?

Ans. Yes sir.

Q. Prior to that time you knew nothing whatever as to the operations of the Nicomen Boom Co., or anything about where the proposed work was to be done by either of the companies?

Ans. Nothing whatever.

Q. And the information which you gained upon that one visit was gained from a personal acquaintance with the Nicomen Boom Company and no one else?

Ans. No information from them, with the exception that they furnished me a plat showing me the limit of their boom—that is all.

Q. Did they show you where their rudder boom was?

A. No sir, I saw it myself.

Q. How did you know it was the rudder boom?

Ans. I knew it was in connection with that boom. I knew that the rudder boom belonged to the boom that was operated there.

Q. Will you explain to the court what you mean by a rudder boom?

67 Ans. A rudder boom is a sheer that is placed on the opposite side of the river from the boom that catches the logs. It is composed of timbers fastened together with rudders acting on hinges attached to the boom. It can be swung up and down the river by the use of its rudder a-d it will sheer the logs into the head of the boom.

Q. I will show you now the plat, which is already in evidence,

and ask you to indicate the position on this plat the rudder boom of the Nicomen Boom Co. as you found it after this suit was brought.

Q. The rudder boom as I found it as near as I can tell from this plat, is practically in the same position as shown by this plat.

Q. You state that the rudder is for the purpose of sheering the logs into the gap of the boom.

A. Yes, sir.

Q. Now what is indicated by the green line there, if you know?

Ans. I should judge that it indicates the portion of the river confined within the boom that had been under construction at that time.

Q. I will ask you as to these brown circles?

Ans. They represent the dolphins that were driven.

Q. And this represents what? (Indicating.)

A. That represents the sheer. The upper dolphin represented here on this map represent- the sheer for the upper boom.

Mr. ABEL: We now offer this instrument that the witness had identified, and ask that it be marked "Identification 'A' for the defendant."

(The same is marked "Identification 'A.'")

68 Q. Now, you say, that if the defendant boom company operate the boom which it was building when you was there, after the suit was brought, and which it has since completed, that it will catch all the logs coming down North River?

Ans. Yes sir.

Q. I will ask you if it is not a fact—or if it is not the necessity of every upper boom?

Ans. Yes sir; booms to catch any logs—that is to catch all logs of any particular brand must certainly catch all the logs coming down the river.

Q. So there is no difference in that respect between this boom of the defendant company and any other upper boom in the state of Washington, is there?

Ans. No sir.

Q. And in respect to the delay of logs consigned to the delivery to the lower boom, the difficulty is merely the natural one of waiting until the freshet goes down—and the delay would be only commensurate with the length of time that the freshet existed?

Ans. Yes sir; until the freshet receded.

Q. Is it not a fact, Mr. Hunt, that if there was only one boom up the river, that the logs could not be rafted when the freshet was on?

Ans. Well, farther down the river—down at the mouth of the river the tides affect the river—they affect it there where they would not affect a mile or half a mile further up the stream.

Q. Well, say 532 feet, or two or three hundred feet—would that make any difference?

Ans. Well, it would depend on where the sorting gaps were.

Q. I will ask you whether or not—that is, if it is not a fact that any delay which there might be in the delivery of logs from
69 the upper boom, that is the defendant's boom, which would be consigned to the Nicomen boom—whether that would not

depend upon the natural causes, to-wit, whether there was a freshet on or not, and it is not in any degree on the manner of construction of the defendant's boom?

A. The location of the boom—it all depends upon the location of the boom, and not on the construction.

Q. Have you ever been up the river above the uppermost point of the defendant's boom?

Ans. No, I have not gone up the river. I have been on the river from all points above that.

Q. Are you familiar with the river above that point?

A. Yes sir.

Q. Up to this old jam?

Ans. No, sir.

Q. The tide water reaches above each of these booms does it not?

Ans. Yes sir.

Q. Do you know the depth—or the difference in the tide at the upper end of the defendant's boom? Did you take any soundings or make any measurements?

Ans. No, sir; I took no soundings or tide readings there.

Q. Now, you have testified, as I understood you, that if the plaintiff builds its alleged proposed extension that it would result in blockading the river and obstructing navigation—that is, as matters now stand, if the plaintiff goes on and builds its alleged proposed extension it will do that?

A. If the other one is built, or if both are built?

Q. Well, if the plaintiff does not build its alleged proposed extension the river will not be blocked?

A. Practically blocked.

70 Q. Is that it?

Ans. Yes, sir.

Q. Will you just explain how it could be blocked if the plaintiff does not build its proposed extension?

A. The defendant has it practically blocked at the upper end.

Q. In what way, and where is it practically blocked?

A. The boom extends up about the middle of the river, and if they use the boom they will occupy all the space between those dolphins and the bank.

Q. On one bank?

Ans. Yes, sir.

Q. That would be on the right bank coming down?

A. Yes, sir.

Q. How about the left bank?

Ans. They have a stationary pile driven directly across on the other bank.

Q. How do you know that?

Ans. I saw it.

Q. You saw it there when you were there?

Ans. Yes, I had it located on my map.

Q. Please show on this map where it was. Show it on defendant's exhibit "A."

Ans. (Witness indicating.) It is at this point here marked on plat. (Marking on plat.)

Q. At what point would the river be blocked at the upper end of the defendant's boom, if there were logs in the boom at the head of it? Would it be blocked any more than this boom—that the plaintiff's boom would block the river?

Ans. Yes, sir.

Q. Now I will call your attention once more to the matter of measurements. Did you take any measurements from the nearest dolphin, driven by the defendant, at the uppermost end of
71 its boom, to the left bank of the North river coming down?

Ans. I did.

Q. What was the distance?

Ans. It was a matter of 27 feet at high tide and about in the neighborhood of 15 feet at low tide.

Q. Wasn't it 15 feet at low tide and 28 feet at high tide?

Ans. It was something like that.

Q. Did you take the depth of the water?

Ans. I did not.

Q. Would that point be blocked?

Ans. It would if you stopped the logs. The dolphins are driven there, and the only way that the sheer would be of any value would be to have a boom stick all along the side to the bank.

Q. You would consider that unless that gap was closed from the dolphin to the shore that it would be blocked? But if the boom stick was not there, the boom stick that would be necessary to close that gap, it would not be blocked, would it? It would depend upon whether you are using it, whether it would require——

A. It would not be of any use without it there.

Q. Did you see any other place left open for navigation?

A. There is a gap between the lower dolphin and the shore, and the upper dolphin and the standing boom.

Q. What is the width?

Ans. About 110 or 120 feet.

Q. Please show where that gap is located.

A. It is a gap apparently just between the lower dolphin in the sheer and the upper dolphin in the race-way.

Q. Boats can pass up on the left bank of the river, can they not, and through that gap and then on up?

A. They could provided the river was not running full of logs.

Q. Just as in this instance—referring now to the upper-
72 most part of the Nicomen boom as actually constructed, the sheer extends into the middle of the river, and vessels or crafts coming up or down would have to double in and go to the opposite side of the river?

A. That boom there, the sheer boom there is a rudder boom and can be swung out of the way.

Q. It does not in fact?

Ans. Except in running.

Q. Are you positive from your own knowledge that you have been there only once?

Ans. Well, from my knowledge of booms in general.

Q. This rudder boom could be swung practically across the river?

Ans. It is practical to swing it out there.

Q. Did you measure the gap at the upper end of the Nicomen boom, as actually constructed, that is the gap as left for navigation?

Ans. No, sir; I did not survey the boom as constructed.

Q. Is it not a fact that the gap left by the Nicomen boom is much less than the gap left by the new boom?

A. No, sir; I don't think so.

Q. You didn't measure one, but you did the other?

A. I didn't measure anything about the boom as constructed there—it was simply the extension.

Redirect examination.

By Mr. STRATTON:

Q. You said in your direct examination that the boom of the plaintiff, when the proposed extension is made, it would be a mile and three quarters—did you refer to the boom which is now
73 being operated and the extension taken together?

Ans. No, sir.

Q. To what did you refer?

Ans. To the extension alone.

Q. Do you know what the length of the present boom is which is now operated?

Ans. Only from the map, is all.

Q. Now, you also say, referring again to your map, being exhibit "D," you say that the construction of this row of dolphins which extends diagonally across the river from the defendant's boom, that it would block the river when the river would be full of logs?

Ans. Yes, sir; I would consider that the river would be practically blocked at that point.

COURT: Would saw logs coming down cause the rudder to shoot out into the stream?

WITNESS: No, sir; that is not a rudder boom. It is a stationary boom, consisting of dolphins that are of the same character as a race-way of the boom—it is constructed the same way. It is constructed of five piles which are driven at intervals of thirty to forty feet across from the head of the race-way to a point within about twenty-seven feet of the left bank of the river at high tide, leaving it about fifteen feet at low tide. The piles were all that was completed of the boom at that time. There were no boom sticks as yet when I made the survey—they had not been strung along yet.

COURT: The boom sticks run along these dolphins?

74 WITNESS: Yes, passing through the dolphins.

Q. Now, state whether or not those dolphins are clusters of piles driven firmly and permanently into the bed of the river?

Ans. They are the same character of the dolphins as in the race-way of the boom.

COURT: How could logs coming down the river get through these dolphins if there are piles extending along the line of dolphins? You say there is a gap at low tide between the dolphins and the

shore of the river. Now, could that gap be obstructed by the logs coming down the river if piles running along the dolphine were strung along there—would it keep a log from going, through between the dolphins?

WITNESS: The dolphins, that is the boom itself and the boom sticks is what consists of the obstruction instead of the logs coming down.

COURT: There is no more obstruction when the logs are running than when not?

WITNESS: In that regard, I mean logs coming down. It would be impracticable to use this gap—or such a gap as that when logs are coming down.

COURT: As I understand you, all logs are caught by this boom?

WITNESS: Yes, sir.

COURT: And would the logs coming down affect the gap if they didn't get into the gap?

WITNESS: There would be so many in there that it would
75 be impracticable to make this turn. The logs would come right along down to the lower end until the boom began to fill up—that is, if there were enough logs to fill it. If there were enough logs running in the river,—it would depend upon that whether the boom would fill or not. But if there were lots of logs running in the river it would be impracticable for the steamboat to make such a short turn as that with drift and logs in the river.

Q. Now, notice this exhibit "G" and notice lots 6 and 7 in section 22—now, if as you say, this sheer boom, the defendant's boom, affects the navigation, what effect would it have with reference to the ingress and egress to lot 7—to and from the navigable portion of North river?

Mr. ABEL: That is objected to as calling for a conclusion of law.

COURT: Your contention would be then, that in this case you would be entitled to an injunction because of the fact that the construction of the defendant's boom would interfere or obstruct the navigation of the river in the vicinity of that lot?

Mr. STRATTON: Yes, as to the tide lands— or the egress and ingress would be cut off from the river. They must do it—with or by a riparian right.

76 COURT: I think the court can draw the conclusion as well as the witness, if the navigation of the river is obstructed.

Mr. STRATTON: But we want to show that lots 6 and 7 are obstructed.

COURT: How much of this defendant's boom is above your lot 3?

Mr. STRATTON: Just a part of the sheer.

COURT: In any event you have no right to claim obstruction from below your lot. Let the witness answer the question; the objection will be overruled.

A. Well, it would obstruct the ingress and egress to lots 6 and 7 to a certain extent.

Q. Would it also obstruct the ingress and egress to lots 5, 6 and 7 in section 22?

Ans. It would from up the river.
Q. And what would be the case with respect to lot 5 in section 27?
Ans. It would be the same from up the river.

Recross-examination.

By Mr. ABEL:

Q. Now, whether the defendant's boom would obstruct the river would depend on the defendant's boom being full of logs, or logs coming down so thick that the gap left for navigation would be choked.
Ans. Yes sir. If there are no logs running in the river I consider the gap of twenty or thirty feet as sufficient for a boat gap.
Q. And you do not know whether logs coming down that river in sufficient quantities to block that gap would fill the defendant's boom?
Ans. I don't know what is being done on North river at this time.
Q. It is a mere matter of opinion, so far as you are con-
77 cerned as to whether it would block the river or not?
Ans. It is my opinion that there is enough timber coming down that river to block it.
Q. That there might be?
Ans. That there will be.
Q. Now, the plaintiff has no houses or structures along there; it is wild land is it not?
Ans. Yes, it is practically wild on the west side, but there is a house or two along there.
Q. You don't know just where they are do you?
Ans. I know where one is.
Q. The plaintiff has no wharves or like structures in the river there?
Ans. No sir.

Re-redirect examination.

By Mr. STRATTON:

Q. I will ask you whether or not it would be practical for the defendant to construct a swinging sheer instead of a stationary sheer boom with dolphins?
Ans. It is practicable to put in a rudder boom.
(Witness excused.)

J. M. CLAPP recalled on the part of the plaintiff to make the correction as to statement made on cross examination.
(Mr. Clapp appears in court and makes the following correction to his former testimony.)
Mr. CLAPP: I will say that I returned from Gray's Harbor to Seattle on September 14th, and met Mr. McGowan on that date instead of October 14th, as heretofore testified to.
(Witness excused.)

78 F. C. HUSTON called on the part of the plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By Mr. WELSH:

Q. Where do you reside?
Ans. South Bend.
Q. What is your occupation?
Ans. I am a civil engineer, and timber cruiser.
Q. How long have you been engaged in such profession?
A. I have been a civil engineer for the past eight years, and timber cruiser for about three years.
Q. I will ask you if you are acquainted with North river?
Ans. Yes sir.
Q. What parts of it?
Ans. All parts of it in this county.
Q. Have you been on and over North river within this county?
Ans. I have; yes sir. Several times.
Q. Did you ever make a survey of the size—or first I will ask you do you know whether or not the plaintiff, the Nicomen Boom Co., has a boom on North river?
A. I do.
Q. Did you make a survey of the same?
Ans. I did.
Q. When did you make this survey?
Ans. I forget the exact date, but it was in October some time of this year.
Q. Who assisted you, if any one?
Ans. Mr. Matt Riley and Dan Lynn.
Q. Was this the old boom that you measured—What is known as the old boom company?

79 Ans. It is the Nicomen Boom Co., it is not the old North river boom.

Q. I will show you this plat here which has been offered in evidence, and I will ask you if you ever saw that before?
Ans. Yes sir; that is a plat made by myself, and my affidavit attached.
Q. How did you make this plat—from an actual survey, or otherwise?
Ans. From an actual survey of the ground with a transit and stadia.
Q. Is that plat correct?
Ans. It is correct for the main boom in the river—the slough is merely sketched in.
Q. At the time you made this survey, state whether or not you took the depth of the water?
Ans. I did; yes sir, with special reference to that.
Q. What stage of the tide?
Ans. Low tide, but the tide was not strictly low—run out.
Q. Is this plat correct, or is it not correct?

A. It is correct; yes sir, as far as I know and to the best of my knowledge.

Mr. WELSH: We offer the plat in evidence.
Mr. RUFFEN: We would interpose an objection to the plat as being incompetent, irrelevant and immaterial.
COURT: Let it be admitted.
(Same is received in evidence and marked as "Plaintiff's Exhibit 'H.'")

Q. You may take that plat and state, from the survey that you made, how many acres that boom contains of water area.
COURT: Does that refer to the old boom or does it embrace
80 any part of the proposed extension.
Mr. WELSH: It is as to the old boom.

Mr. ABEL: We object to the witness testifying from the plat.
COURT: He was asked to testify as to the area of the old boom.

A. About fifteen acres.
Q. That is, in the main river?
Ans. Yes, in the main river.
Q. What stage of the tide?
Ans. At the stage I spoke of, low water—the nip of the tide.
Q. Is not that too much—is it not only about——

Mr. RUFFEN: We object if the court please.
COURT: It is leading the witness.
Mr. WELSH: I will withdraw the question.

Q. Is that plat drawn to scale?
A. Yes sir.
Q. You may take the scale and figure it. Scale the size of the old boom as it now is.
Mr. ABEL: We would make the objection to the measurement taken from the plat, for the reason that if he has his original notes we think they would be the best evidence.
COURT: If you are satisfied the plat was made to scale he may state what it is.

A. You want the length of this scale?
Q. Why, I simply want the number of acres—the area of the main boom as shown by that plat, according to the scale of your plat.

81 Mr. RUFFEN: In order to keep our exceptions, we again object to all this line of testimony as irrelevant and as being improper.
COURT: The objection has been made and exception allowed.

A. I see no reason to change my estimate at that stage of the water.
Q. You said that you were a timber cruiser? Now, state whether or not you are familiar with the timber tributary to North river.
Ans. I am to a considerable extent.
Q. Mr. Hueston, do you know what is the catching capacity of an acre of a boom is in a river like North river?

Ans. I have the figures that I usually use in making such an estimate—I know what I usually estimate such an area at.

Q. You have made estimates, have you?

Ans. Yes sir; I have made estimates.

Q. You may state.

Mr. ABEL: We make the objection that the witness has not shown himself competent.

COURT: You may cross examine him if you wish.

By Mr. RUFFEN:

Q. To what extent has been your investigation along these lines? Have you ever been in the logging business?

Ans. No sir.

Q. Have you ever measured logs lying in a boom?

A. I have scaled logs; yes sir.

Q. How often?

82 Well, I don't know how often. I have scaled a good many logs, though.

Q. In scaling, were you scaling with a view to ascertaining the number of logs or the number of feet that would lie in one acre of boom area?

Ans. No sir; I have scaled them with the idea of getting the number of feet in the individual logs.

Q. To ascertain the number of thousand feet, but you did not take into consideration the boom area that those logs were lying in, as to acres—you didn't figure it, did you?

Ans. I never did; no sir.

Mr. RUFFIN: Then we certainly object to the testimony.

COURT: I think there should be more competent testimony as to that point. **The objection will be sustained.**

Mr. WELSH (continuing):

Q. Mr. Huston, at the time you were on North river state whether or not you observed the location of the defendant's boom and boom structure at that time in that river?

Ans. I did, at two different times.

COURT: That was when?

Mr. WELSH: The 29th of October of this year.

WITNESS: That was one occasion and the other was some two weeks previous to that—I forget the exact date of that.

Q. Did you make any observations so as to determine whether or not, what side of the river their boom was on.

A. Yes sir.

83 Q. Will you explain to the court, now, about what its location was at that time.

Ans. At that time they had—well, I was there at two different times.

Q. Well, during the times you were there.

A. Well, the first time I was there there were scattering piles between two points—about three hundred feet above the plaintiff's

sheer boom on the right hand side of the river, and up the river, I should judge, about 2500 feet. And then there was row of dolphins—I believe I counted twenty-six at that time, and later when I was down there the dolphins were very close to where the lower end of where the scattered piling was. They were there apparently for the purpose of making a new boom on the right hand side of the river.

Q. But did it or did it not cross over to the left hand side of the river?

Ans. At the upper end, where they evidently intended their sheer boom to be, it did, yes sir.

Q. State to the court how their sheer boom was constructed at that time?

Ans. At that time they had no sheer boom in.

COURT: Will the witness explain that sheer boom?

A. At the upper end of every boom they place a sheer boom, or a rudder boom, across the river, and it is anchored on the opposite side of the river from which the boom is on. And it overlaps a distance of say 100 or 150 feet—about 100 feet above the upper pile of the boom—overlaps it so that when logs are coming down the river they are deflected into—or turned off through there so they can not
84 go off into the main river—and they must necessarily float into the boom. It is merely a slanting stick in the river, so that logs striking it will go into the boom and not into the main river.

COURT: Logs coming down on the upper side would naturally come into the boom would they not—but logs on the opposite side would be deflected into the boom?

A. Yes, it is made that way in order not to obstruct navigation.

COURT: How is it anchored in the river?

A. It is anchored by chains, and it is usually anchored to a pile on the shore end. And then it has rudders on the lower end of it to catch the current to help sustain it in place.

Q. Well, during any time that you were there did you see their sheer boom?

Ans. I never saw their sheer boom.

Q. What part if any did you see?

Ans. Merely the proposed anchor or piling.

Q. Did you make any observations to see whether or not that would be located on the tide lands of the——

(Objected to as being incompetent, irrelevant, and immaterial and improper.)

(Objection sustained.)

Q. State what its location was with reference to the left hand side of the bank. Did you ever see the boom?

Ans. Not the boom itself, just the anchorage.

Q. What did the proposed anchorage consist of when you
85 saw that?

Ans. Well. it is piling driven——

Q. You mean driven or not driven?

A. Driven into the tide land, or into the bank.

Q. Mr. Hueston, did you observe or make any observation as to whether these were on the tide lands or not on the tide lands?

Mr. RUFFEN: We object for the reason that the witness has not yet shown that he has any knowledge of what the tide lands are.

COURT: He may state the location and the court will determine whether they were tide lands.

Q. Mr. Hueston, do you know what tide lands are?

A. Yes sir.

Q. What are they?

Ans. Lands bared by the ebb and flow of the tide.

Q. State the location of this part of the sheer boom, or that you saw of the defendant's boom with reference to where its location was to the left hand side of the bank.

A. The proposed sheer boom would be on the left hand side of the river—the proposed anchor of the proposed sheer boom would be on the left hand side of the river, It would have to be in fact.

Mr. ABEL: We move to strike that out as not being responsive.

COURT: He may answer where it is located.

A. It is located on the left hand side of the river.

Q. State its location as to whether it was or was not on the tide lands.

Ans. I believe it was.

86 Q. What did those anchors consist of? How many were there?

Ans. It was a pile.

Q. Was that the only one?

Ans. That is all they had there.

Q. Did you observe any dolphins there?

Ans. Yes sir.

Q. Describe them.

Ans. They were a bunch of piles, five or six driven close together with a batter on the outside.

COURT: Where was that dolphin with reference to this anchorage?

A. The dolphins were driven down in the middle of the structure, and up to, I should judge, within about 150 feet below the point opposite to the anchorage.

Q. How many dolphins were in there at that time?

A. The first time I was there I counted twenty-six.

Q. How many in the sheer boom?

Ans. Well, there were three piles there driven in bunches; they were driven in a line.

Q. Give the depth of the water at the stage of the tide when you measured this boom of the Nicomen Boom Co.

Mr. RUFFEN: What boom do you mean?

Q. I have reference now to the Nicomen Boom Co.'s boom.

A. Well, the depth of the water varies all the way from twenty feet to twenty two or three feet.

Q. At what stage of the tide did you measure water area of the Nicomen Boom Co.'s boom,—the old boom?

—. At low tide.

Q. Explain to the court what the depth would be in the different places.

Ans. In the upper part of the boom I would say——

87 COURT: What is the materiality of that?

Mr. WELSH: We want to show that certain parts of that boom were perfectly bare at low tide.

COURT: You have reference to the old boom?

Mr. WELSH: Yes sir.

Q. What would the acreage of the Nicomen Boom Co.'s old boom be at extreme low tide?

Ans. I should judge about thirteen acres.

Q. Did you observe the effect that the construction of the boom by the defendant company at the place it had laid out on North river would have upon the navigability of North river?

Ans. Yes sir, I took some observations.

Q. You may state to the court what that effect would be.

Mr. ABEL: We object to the witness giving an opinion. Let him describe the conditions.

COURT: He may describe the conditions that existed.

A. I took soundings to show the depth of the water on each side of the river within the proposed boom of the defendant, and that was proposed to be left for navigation. I found that the depth of the water on the right hand side of the river to greatly exceed that on the left hand side of the river.

Mr. HEWEN: Which way do you mean?

WITNESS: Going down the river. We always consider that we are going down the river when we speak of right or left.

88 Q. Which side of the river does the defendant have its boom—the proposed boom?

Ans. The defendant company proposes to have it on the right hand side of the river.

Q. From the observations that you made at the time you were there and from having measured both—measured the depth of the water, state what effect it would have upon the navigability of the river for boats and vessels and steam craft and water craft of various kinds, if the defendant company constructed its boom at the place they have proposed to in North river?

Mr. HEWEN: We will make the same objection.

COURT: Let him state the depth of the water in the river now occupied by the boom of the defendant company, and let the court draw the conclusion.

A. I found one place to be particularly bad, where a large snag came within six or eight feet of the dolphins of the defendant company. There are several other places to make the stream not navigable—that is where there were snags that would make the stream not navigable on the left hand side. Also the depth of water on the left hand side, which is supposed to be left open for navigation, were at some places of no greater depth than three feet, and at other places there were seven feet, and other places only four or five feet.

Some places there was plenty of water—eight or ten feet, but on the right hand side where they proposed to have the boom in some places I found seven feet—that is, at some places I or rather,
89 at the same place that I found seven feet on the left hand side I found seventeen and eighteen feet on the right hand side; also one place where I found three feet for the navigation on the one side there was twelve feet on the other side. It was in like proportion all along until the lower end of the boom was reached, where I found the depth of water nearly equal on both sides.

Q. You say it was nearly equal on both sides?

A. Yes sir, on the lower end of the boom it was about the same on the side where the boom was as it was on the side that was left for navigation.

Q. I will show you plaintiff's exhibit "G" and ask you to state if that is a true representation of the pilings or dolphins of the defendant company's at the time you were there.

COURT: Was that plat drawn by this witness?

Mr. WELSH: No, your honor.

COURT: Whose plat is it?

Mr. WELSH: That is Mr. Hunt's plat.

WITNESS: That shows it practically as I saw it at the time. And I noticed that the lower dolphin was approximately in range with the mouth of the small slough. It is called Smith's slough on this plat.

Q. At the place marked "A" on the plat, will you please tell the court what the depth of the water was?

A. The depth of the water there was, I believe, about nine feet.

Q. Now, at the place marked "B," I will ask you to state the depth of the water there.

Ans. The depth, I believe, was four feet.

90 Q. Have you observed the tides of North river?

A. Yes sir.

Q. Were you there at extreme low tide?

Ans. I was there at extreme nip tide.

Q. How much shallower would the water be at extreme low tide?

A. It would run out four or five feet lower than that.

Q. Then at the mark "D," at an extreme low tide, would it be covered or uncovered?

Ans. I believe that it would run dry there at low water.

Q. You may state, Mr. Houston, from the observation that you made at that time and the times that you were there—whether there would be any navigable water between the inner shore line and sheer of the defendant's structure?

Mr. ABEL: We would make the same objection.

Let the witness state what the depth of the water was.

(Same ruling. Exception taken.)

A. It is a rapidly rising bank within a few feet there, and it runs up on a slope.

COURT: Do you mean to say that the boom of the defendant company is so constructed that it would be impossible for a boat to navigate the river between the line of the dolphins and the opposite bank?

WITNESS: Not the line of the dolphins. I refer to the inner pile.
Q. At the upper end?
Ans. At the upper end, yes.
Q. You may state what the distance is between that inner
91 dolphin of the defendant company and the pile and the bank of the river, as near as you can recollect it from the observation that you made at low tide.
A. I should say that it was about fifteen feet from the shore to that point.
Mr. ABEL: At low tide?
WITNESS: Fifteen feet to the bank without reference to the tide. The height of the tide has nothing to do with it. I am measuring from the bank to the pile.
Q. You mean at the time you were there?
Ans. At any time.

By Mr. STRATTON:

Q. What is the distance between the inside pile and the bank at ni-p tide—that is, at the time you were there?
Ans. About fifteen feet.
Q. If I understand you rightly, there is simply five feet between the inner shore pile, which consisted of the uppermost extremity of the defendant's sheer boom and the low tide line, that is, where the low tide reached the tide flats?
Ans. Yes sir; about five feet.

By Mr. WELSH:

Q. What would it be at extreme low tide?
A. I gave my opinion that it would about run dry at extreme low tide.

Cross-examination.

By Mr. RUEFEN:

Q. What do you mean by extreme low tide in your testimony, Mr. Heuston.
92 Ans. That which would run out to the datum line as given in the government tide tables.
Q. Tell us what that datum line is.
Ans. It is a line adopted by the government, being very near to the extreme lowness that the tide will run.
Q. Now, what time of the year does that tide exist?
A. It usually comes in the winter time. We have our lowest tides in the winter.
Q. During what time do you have the lowest tide?
A. They are in the winter season.
Q. What do you call the winter season?
Ans. Well, from November until March.
Q. What time were you there?
Ans. I was there in October.
Q. What time in October?

Ans. I was there twice in October—I was there on the 29th of October and then some two weeks previous to that.

Q. Now Mr. Heuston, did you measure the distance between this last pile and the bank?

Ans. I did not.

Q. Did you measure the depth of the water at this pile?

Ans. I did.

Q. How did you do that?

Ans. With a rod—a level rod.

Q. Now, what was the condition of the tide at the time you made this measurement?

Ans. It was low tide. It was very close to low tide.

Q. Who was with you?

Ans. No one, I was alone that day. I took my rod and row boat and went up there to make that sounding.

Q. But you did not measure the distance between the piling and the bank?

Ans. I did not.

93 Q. Did you, or do you know to what extent that river—what is the character of the navigation there in this river? You have testified as to the navigability of that river—now what boats navigate that river. What is the custom up there—what kind of boats navigate there, the character of boats.

Mr. STRATTON: That is objected to as being incompetent, irrelevant and immaterial. It is considered a navigable stream.

(Objection overruled and exception taken.)

A. Well, light craft—boats, and maybe occasionally a tug or tow boat goes up there.

Q. Do you understand, as a matter of fact, that floating logs are one species of navigation?

(Objected to as being immaterial.)

(Objection sustained. Exception taken.)

Mr. RUFFEN: That is simply to show whether or not North river is——

COURT: It is for the court to say what the law is.

Q. Now, as a matter of fact, when you visited the McGowan boom did you measure the water there?

Mr. STRATTON: Well, we think the place should be given. That boom is four thousand feet long.

COURT: Was there any McGowan boom?

Mr. RUFFEN: I mean the Nicomen boom, at any point outside of the boom in the navigable waters there.

94 Mr. STRATTON: That is objected to as being immaterial.

COURT: He may answer that question.

A. I did; yes sir.

Q. What did you find as to the depth there?

A. I found that the water was deep until I arrived at the lower end of the boom at the first bar that runs clear across the river—

not entirely across, but it runs very nearly across. Inside of the boom it runs very nearly across, but outside of the boom there is a channel of about six or eight feet.

Q. You mean at extreme low tide?

Ans. Yes sir. The bar is almost entirely within the Nicomen boom.

Q. Did you measure that all along the McGowan boom?

A. I measured the bar until I came to deep water.

Q. At the point of this pile, Mr. Heuston, you say the bank rises rapidly?

Ans. It begins at once, yes sir.

Q. How rapidly does it rise?

Ans. I should say that it rises one and one half to one. It rises until it comes to the breaking off place of the shore, and then it rises straight up, like all those tide rivers and sloughs do.

Q. Did you measure the slope?

Ans. No sir; but in a wash like that it ordinarily takes a slope of one and a half to one—that is the natural slope of earthwork.

Q. Did you measure the distance between the two booms?

A. No sir; I didn't.

Mr. HEWEN (continuing):

95 Q. As I understand your evidence, you state that at the date of low tide, in your opinion, and not from the actual measurement that that land would be bare. Now, will you explain more fully what you mean by datum low tide?

Ans. The datum line is the one used by the government. I cannot state how they obtain that.

Q. Is it ordinary low tide, low tide, or the lowest tide?

Ans. I believe it is what the government calls the low, or low water.

Q. That is the lowest average low water?

Ans. Yes, I believe that is the datum line—that is my opinion.

Q. Do you know whether this line will be exposed or not at ordinary low water?

Ans. I must beg leave to ask what the average low water is then?

Q. Average low water, taking all low water—the different extremes of low water?

Ans. I confess myself unable to make such an estimate.

Q. Did you or did you not testify that this land would be exposed at the average low water?

Ans. I cannot testify either way—I cannot establish an average low water.

Redirect examination:

By Mr. JOHN WELSH:

Q. You testified on cross examination that this river was navigable by tug boats and tow boats occasionally. Do you know the depth of water which a tug boat draws?

A. Well, I should think that a tow boat or a tug boat would take six or eight feet of water.

Q. Such as are used on this harbor?

Ans. Well, tug boats like the Edgar and other boats like that will take that amount of water under ordinary conditions.

96 Q. And about what depth of water would they need to pass through there in the ordinary line of business which they pursue.

Ans. Well, they would want, in doing that, a good passage way —in my opinion fifty or sixty feet. Of course, a tow boat can go through a passage and get through a thirty foot passage-way without any trouble.

COURT: Where booms are constructed in rivers such as North river, is it customary to tow logs above the boom with tow boats?

A. It is very often the case that a tow boat will go up above to do work. Sometimes they have to take up a string of boom sticks—something of that sort.

Q. Would it be often, Mr. Hueston, that a tow boat would, in the ordinary line of business—in the ordinary business of towing a boat or a raft, to pass up past the boom of the defendant.

Ans. You mean with a raft—at what stage of the tide?

Q. Yes, at any stage of the tide?

Ans. They would not attempt to take a large raft down there—they could not. There would be no object in getting a large raft up there—they would not attempt it.

Recross-examination.

By Mr. ABEL:

Q. Have you ever known of a tug boat being in that part of North river where the defendant's upper works are located?

Ans. Why, only by hearsay. I don't know from seeing it.

Q. Nothing to go up there for?

Ans. No.

97 Q. They used to raft logs above where the upper—This was when there was a boom up the river above that?

A. Above the defendant's present boom—they took boats and went up there often.

Q. That is before you came here?

Ans. Yes sir.

Q. But at the present time there is not any such craft plying upon North river?

Ans. Not as a regular thing.

Q. And it would *ne becessary* in the operation of either of those booms, either the plaintiff's or the defendant's, to take up strings of boom sticks to the upper end of the boom?

Ans. They would not take them up, but my remark was that sometimes they took out boom sticks and such things—taking them from higher up the river without booming them—making up a string and towing them down.

Q. You have an opinion that that could be done?

A. Yes sir. It has been done on Bear river and such rivers as that.

(Witness excused.)

Mr. GRUBB called as a witness on the part of the plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By Mr. STRATTON:

Q. Where do you reside?
Ans. Well, no particular locality. Anywhere just now, but my residence has been on the Nema until just lately.
Q. The Nema is a river?
Ans. Yes sir.
Q. In this county?
Ans. Yes sir.
98 Q. How long have you resided in this county?
A. Over twelve years.
Q. What has been your occupation during that time?
A. Logging and rafting.
Q. Have you ever had any experience in booming and rafting saw logs in this county?
Ans. Yes sir.
Q. How much experience have you had?
Ans. I have been doing something at it for a period of ten years.
Q. From your knowledge of booming and rafting, can you say what the holding capacity of a boom is on rivers like you find in Pacific county—that is to say, the holding capacity of a boom where the logs are of a size as you will find them there?
Ans. You mean after they are scowed?
Q. Yes, taking the average size of logs coming into Pacific county?
Ans. I have never figured it out.

Mr. RUFFEN: We would object to that line of testimony.

COURT: We admitted that line of testimony yesterday and I do not see what figure it cuts here, unless it is shown that the logs are sized up in these booms and put along side of each other.

Mr. STRATTON: The purpose is to show the necessity of increasing the size of the boom.

COURT: The boom is simply made to catch the logs as they come?

Mr. STRATTON: I want to show the holding capacity and then figure the catching capacity from the holding capacity.

Mr. RUFFEN: We would object to questions of that char-
99 acter, tending to show the necessity, etc., as being incompetent, irrelevant and immaterial.

COURT: The objection has been made and overruled and exception allowed. He may answer the question.

Mr. STRATTON: Under the suggestion of the court, I will eliminate that phase of the question.

Q. Can you state, from your experience, Mr. Grubb, what the

catching capacity of a boom, per acre, is of the average size, as this one is in the western part of Pacific county, and to hold the logs such as are cut in the direct vicinity tributary to North river?

A. We gained our information of the catching capacity from the stowing capacity because from the stowing capacity we knew how many thousand feet we would have in a certain space, and of course from that we gained our information of the catching capacity in the stream where I lived. But the catching capacity of a stream in fresh water and a steam in tide water is entirely different.

COURT: As to North river?

A. I don't know, only from experience on North river.

Q. Speak from your experience on the Nema.

A. Well, as near as I could ascertain, in the neighborhood of 300,000, as they come down—catching capacity, drift and all combined.

Q. Then you say 300,00 feet of logs would occupy an acre of boom area?

Ans. Yes sir.

Q. Now, how far up the river did you do your booming;
100 up the Nema river?

Ans. Well, it was all in tide water, and there was the tide and the current of the stream; it was narrow and the tide did not affect a good many of the logs after they were lodged by the freshet. After they were lodged the tide did not affect them.

Q. That is to say that the ebb and flow of the tide would not move the logs along with it when it would come down stream?

Ans. Yes sir.

Cross-examination.

By Mr. ABEL:

Q. Now, Mr. Grubb have you ever run a boom.

A. We had a company boom.

Q. Were you a member of the company?

Ans. Yes sir; it was incorporated.

Q. Did you ever have charge of it; that is, the management of it?

Ans. We all managed it together.

Q. You never made any estimate to see how much an acre of boom area would hold?

Ans. We did in rafting, but not in catching.

Q. In other words, when you rafted your logs and sold them you would know how many had been in your boom—you could tell whether the boom was nearly full or not?

A. Of course, we attempted to do that when they went out—about how many thousand feet we would have.

Q. How large was the boom on the Nema?

Ans. There was a boom driven the whole of the way down; the boom was one continuous boom.

Q. Well, where was this boom that you were interested in?

Ans. It was at the mouth of the river.

101 Q. How large was the boom?

Ans. Well, it was, you might say, five or six miles long, if

it was built up with logs, but it was only shut in front, in the mouth of the river.

Q. In other words, you had sticks across the river and had the whole river boomed?

Ans. Well, yes; we had a boom stick across.

Q. Then you don't know what the capacity of the Nema boom was?

Ans. I know about what it would hold, up as far as the water affected it.

Q. When did you arrive at the conclusion that an acre of boom area would hold 300,000 feet, board measure?

A. I judge from the sorting capacity and the catching capacity, and I would be, or was confident that it required fully as much space to hold the same amount of logs that came down the river as if they were stowed.

Q. Do you have large logs on the Nema?

Ans. Yes, as large as a rule as at any place; very good size.

(Witness excused.)

E. F. BOHANNAN, being called as a witness on the part of the plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By JOHN WELSH:

Mr. WELSH: Plaintiff now offers in evidence license from the secretary of state of the state of Washington, to the Nicomen Boom Co., authorizing the said company to do business. Which
102 license was issued on the 21st day of July, 1903, and we ask to have it marked as "Plaintiff's Exhibit 'I'."

COURT: It may be admitted.

(Same is marked "Plaintiff's Exhibit 'I' ").

Q. Where do you reside?

Ans. South Bend.

Q. How long have you resided in this county?

A. Since the 6th day of last January.

Q. What is your occupation?

Ans. Well, I hardly know; I am a little of everything. I buy some logs and put some in by contract, and it shows up, and looks like business with money in it.

Q. What is your occupation?

Ans. My occupation at the present time is dealing in logs.

Q. What experience, if any, have you had in the booming and rafting of saw logs in this county, in Chehalis county in this state?

Ans. I never had much experience in Chehalis county. Of course, I have been around booms some, and had some experience throughout the state of Washington; but most of my experience in the state of Washington has been here.

Q. Where?

Ans. At Smith Creek.

Q. Where is Smith creek with reference to North river?

A. Well, it empties into North river in section 35, and the boom I own is in section 36.

Q. Do you own a boom; that is, are you a member of a company that owns a boom?

Ans. Yes sir.

Q. What company is that?

Ans. The Smith Creek Boom & Driving Co.

Q. What official position, if any, do you hold in that
103 company?

Ans. I am president of the company, and manager.

Q. As such officer, have you had any experience in the rafting and booming of saw logs?

Ans. Yes sir; I think I have.

Q. Do you know the character of North river?

A. Well, of course, I am very well acquainted with it at the mouth where the McGowan boom, or the Nicomen boom is—whatever they call it. Of course, I have not been any farther up the river than where this proposed extension is that you speak of. And I was only there at one time.

Mr. ABEL: This is where the proposed extension is, you say?

A. That is the one by the plat—that is the only time I was ever up there.

Q. Do you know the catching capacity of the boom in North river and other booms in this county?

Ans. Well, all the way I know is by my own rough way of figuring it out, and that is all I know.

Q. Give your estimate, if you can.

Mr. ABEL: We object to that as the witness has not shown himself qualified to testify.

Q. Do you know from your experience, the catching capacity of a boom?

Ans. Yes sir.

Q. You may state, from your experience, what estimate you can give on that.

Ans. On this boom?

Q. Any boom in western Washington, or in this county either.

Ans. It is hard to do that, Mr. Welsh; it is a very hard
104 thing to do, either in this county or any other place. There is so much difference; and then there is so much drift and roots and stumps, etc., that it is hard to get at an accurate estimate.

COURT: Can you give an estimate?

A. Oh, it will run all the way from 350,000 to 400,000, probably.

Q. You mean per acre?

Ans. Yes, something like that. I don't know whether it would run that or not in these small streams. But it would be something thereabout.

Cross-examination.

By Mr. ABEL:

Q. What boom were you connected with in Chehalis county?
Ans. I was not connected.
Q. Did you work on any?
Ans. Yes, sir.
Q. What boom?
Ans. Paulson's boom.
Q. How long did you work for him?
Ans. I don't recollect.
Q. Where did you work for him?
Ans. I think it was either in 1899 or 1900; I would not be sure.

COURT: Is this a disputed question in this case as to the catching capacity of an area in a log boom?

Mr. ABEL: Partly; of course, it is immaterial.

COURT: If it is material, I would suggest that you are taking a good deal of time with it. I should think so, if you do not intend to rebut it.

Mr. HEWEN: We did intend to rebut it.

Mr. ABEL: I will try to shorten it.

105 Q. When did you become connected with the boom company on Smith creek?
Ans. I bought that boom; well, at various times. It took me about a month or six weeks to get it.
Q. When was that?
Ans. That was in this year.
Q. How long ago was it?
Ans. I commenced in January.
Q. How long have you been operating it?
Ans. Well, since that time.
Q. How much time since that period?
Ans. Well, that I cannot tell you.
Q. Why—don't you keep any books or records?
A. I do.
Q. Indicating how much time or what you have done?
A. I have not the figures here.
Q. Can you tell in a general way?
Ans. I might make a rough guess at it. I would not say positively, because I am not here to tell a lie.
Q. Have you given it to us as nearly as you can?
A. I should judge about a million and a half, something like that; I would not say.
Q. You are not positive as to that?
Ans. Oh, no; I would not be positive about it.
Q. It might be then only 200,000 feet?
Ans. Oh, no; I don't go to extremes on anything.
Q. How long did you work for Mr. Poulson?
Ans. I could not say.
Q. As much as a week?
Ans. Oh, yes.

Q. Now, in speaking of Mr. Poulson—you refer to Poulson Brothers Logging Co.?

Ans. Yes, sir.

106 Q. Or to some boom company?

Ans. Poulson Brothers Logging Co.; they have a boom up there.

(Witness excused.)

ELI ROCKEY called as a witness on the part of the plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By Mr. STRATTON:

Q. What is your name?
Ans. Eli Rockey.
Q. Where do you reside?
Ans. At Bay Center.
Q. How long have you lived in Bay Center?
Ans. Oh, for some time.
Q. How long have you lived in this county?
A. Fifteen years next March.
Q. State what experience you have had in the booming of logs in Pacific county?
Ans. About nine years of booming and rafting.
Q. State whether or not you are acquainted with the timber tributary to North river?
Ans. I am.
Q. Can you say from your experience that you have had in the booming and rafting of logs, what the catching capacity of a boom per acre is, of logs of the average size which come down North river?
Ans. I think I can.
Q. You may state.
Ans. 275,000 or 300,000 feet.

Cross-examination.

By Mr. ABEL:

Q. How frequently have you been on North river?

107 A. Possibly twenty-five times altogether.

Redirect examination.

By Mr. STRATTON:

Q. State whether or not you ever had any conversation with Mr. P. J. McGowan, president of the plaintiff company in this case, with reference to any proposed extension of the Nicomen boom, which was built in the year 1900.

Mr. ABEL: That is objected to as being incompetent, irrelevant and immaterial.

(Objected overruled. Exception taken.)

Q. You may state when that conversation took place; where it was and the purport of it.

Ans. It was in June, I think, of this year; on the Steamer Reliable. We were talking on the subject of logging and on the North river boom in general, and was talking about the cost of it and about the amount of logs formerly put into North river, and the amount said to be put in in the present year, and he said that he had been advised by the members of the—or by the managers of the boom that he would have to extend it, and he was going to do it at this time. That he was going through to see about it—and that if the logging industries on North river were going to keep up and grow, that he would have to extend the boom. That was the sum and substance of the conversation.

Q. State whether or not Mr. McGowan said anything about any original intention to extend the boom.

Mr. ABEL: That is objected to as being leading.

(Objection overruled.)

A. I think we covered, in the general conversation the subject of the capacity of the boom, and his intention to extend it; and
108 that he had been advised this year for the first time that he would need to extend the boom. It was understood through all of the conversation that he intended to extend the boom to the capacity of the logging done on that stream. That he had the capacity in which to extend it, and that he always intended to extend it to suit the amount of logging, and that he had been advised to do it, and that he was making that trip for the purpose of looking it up.

Q. Well, now, did you have any contract with Mr. McGowan, or with the Nicomen Boom Co. for furnishing piling for the extension, or the proposed extension, of the Nicomen boom?

Ans. I did.

Q. When was that contract let?

Ans. On the 25th day of September of this year.

Mr. HEWEN: We would object to this line of testimony.

COURT: Upon your theory that your company would have a right to extend the boom? I do not see the materiality of all this, but you can put it in the record for what it is worth.

Q. What is the purport of that contract?

Mr. ABEL: We would object to that as not being proper.

COURT: Objection sustained.

Q. Was that contract in writing, or was it an oral contract?

Ans. It was an oral contract.

Q. State what it was.

109 Ans. It was a contract for twelve hundred 40 foot piles and nine thousand feet of boom sticks.

Q. That is 9000 feet, lineal feet?

Ans. Yes, sir.

Q. Do you know what they would be used for?

A. In driving a boom. He said that he had been disappointed

in some piling, that he had ordered from a Mr. Cole, and he came to me to see if I could get them out for him.

Q. Now, in what boom were these sticks to be used?

A. In the Nicomen boom.

Q. In the extension of the Nicomen boom?

Ans. I presume so; yes sir.

Q. Now, you say it was for 9000 feet of lineal boom sticks. Do you know how long the extension is?

A. I do not.

Q. How many piling did you say?

Ans. 1200 piling.

Q. In what construction were those piling to be used?

A. In a boom, as stated.

Q. How do you know that these piling and boom sticks were to be used in the extension and enlargement of the Nicomen boom?

Ans. Well, the manager, Mr. Dan Lynn, told me that was what they wanted them for; to extend the boom.

Q. Through what agent did the Nicomen Boom Co. make this contract?

Ans. Through the manager of the boom; Mr. Dan Lynn.

Cross-examination.

By Mr. ABEL:

Q. When did you learn that this suit was first pending, Mr. Rockey?

Ans. I heard of the business before that time, when that
110 injunction was served out; and that is all I know about. I was not connected with it in any way.

Q. What is your business?

Ans. Logger.

Q. On what river?

Ans. Phalix.

Q. Where is that?

Ans. At Bay Center.

Q. What kind of piling were you to furnish?

A. Fir, spruce and hemlock, forty feet in length, and twenty inches at the butt.

Q. The contract was not in writing?

Ans. No, sir.

Q. Where was it made?

Ans. At my house in South Bend. I used to live there.

Q. You and he talked over the suit at that time, did you not?

Ans. No, sir, he came to me purely as a matter of business. At that time I was living with my brother.

Q. When did you give an affidavit in this case?

A. Not long after that.

Q. Right away?

A. I gave it to both parties.

Q. I will ask you when you gave the plaintiff an affidavit as to this contract?

Ans. Not very long afterward; probably a weak or ten days; probably two weeks.

Redirect examination.

By Mr. STRATTON:

Q. Did you give both parties an affidavit?
Ans. I told them that I was not afraid to testify to the truth in court, and I gave them an affidavit as well as the other. It was a *bona fide* contract that I made with him.

Recess for lunch.

111 Afternoon Session — as follows:

P. J. McGOWAN, called for the plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By Mr. STRATTON:

Q. What is your name?
Ans. P. J. McGowan.
Q. How long have you resided in Pacific county, Mr. McGowan?
Ans. I have resided in Pacific county as a home ever since 1852.
Q. Since 1852?
Ans. Yes sir; since 1852.
Q. Were you the organizer of the Nicomen Boom Co.?
A. I assisted in organizing it.
Q. You are the principal stockholder in that company, are you not?
Ans. I am; yes sir.
Q. When was the Nicomen boom, as now operated, constructed?

Mr. ABEL: We object to that as not being material. It should be limited to the time of the commencement of this action, or to the alleged rights of the defendant.
COURT: As to the original boom, let him answer.

A. As near as I can remember now I think it was completed in the year 1890.
Q. You mean the year 1890?
Ans. 1900, yes sir.
Q. Then it has been in operation a little more than three years up to this time?
Ans. Yes sir.

Q. You may state to the court what your intention was in
112 constructing or in the formation of this corporation for the construction of the boom?

Mr. ABEL: That is objected to as not being the best evidence, and as being hearsay, and as being incompetent, irrelevant and immaterial.
COURT: I will not pass on the relevancy of the question.

A. On the information that I had at that time I judged that there would be a large amount of logs come out of the river—out of North river, and that in order to do that it would be necessary to prepare for

it on a considerably extended scale. I therefore planned, as you notice, the plat,—a further plat, not only in the North river, but in the large slough back of what we call the current, back of the piece of land there, and intended to cut through at the head of the slough for a short distance so as to run along—so as to run logs not only down North river, but also down the slough.

Q. Well, what about that proposed cut or channel?

A. I applied for permission——

Mr. ABEL: We object not only as being incompetent, irrelevant and immaterial, but as not being the best evidence.

COURT: He may answer.

A. I applied for permission to cut from the North river into the slough in order to make it more convenient.

COURT: I hardly think it necessary to go over all this.

Mr. STRATTON: Only as to the design and intention. I
113 think perhaps we can save time to let him proceed.

COURT: Very well, then, proceed.

Q. Go ahead, Mr. McGowan.

A. And I gave Mr. Clapp the instruction to make the plan as represented in the plat presented in court here.

Q. You mean the plan from the war department?

A. Yes; I first got permission from the war department, and in compliance with that permit I told Mr. Clapp my plan and he made that plan accordingly.

Q. Did you get permission to cut the channel?

Mr. ABEL: We object as not being the best evidence.

(Objection overruled. Exception taken.)

A. I was not permitted to do so. The war department would not consent to my entering North river.

Q. State to the court why it was that you constructed a boom over a portion only over the territory from which the war department gave you a right to construct a boom.

A. Well, my idea of the plan was this; that I would construct a boom more than adequate for the immediate need of the loggers. I deemed it too great an expense to make a couple of miles of boom for the few loggers that were in there at that time. I, therefore, made such a boom as now exists there, that would contain perhaps from ten to twelve million feet of logs. In case the business would increase I proposed to continue at the same work to the end of our boom.

Q. That is, to the uppermost extremity of the boom as it appears on the plat of the permit from the secretary of war?

114 Mr. ABEL: That is objected to as being leading.

COURT: Let him answer.

A. Yes sir.

Q. I will show you, Mr. McGowan, plaintiff's exhibit "B"; do you recognize this plat as the one issued to you by the secretary of war?

Ans. Well, it is one as near it as probably could be gotten up. Of

course, I could not swear that is the one, but that is the description, and here is where I had reference to the cut-off.

Q. Examine that certificate.

COURT: The certificate speaks for itself. Ask him if this plat was given him by the department.

Mr. STRATTON: Yes, they are attached together.

Q. Now, I understand you to say that you proposed to extend and enlarge that boom up the river, as shown by the line in red up to the point which is marked "K" in red?

Ans. Yes, that was the intention. And then the intention originally, if we got permission, was to run the logs down the slough.

COURT: Is that permission of the government given to Mr. McGowan individually, or to the corporation?

Mr. STRATTON: It was given to P. J. McGowan and others.

Q. For whom, Mr. McGowan, were you acting in securing permission from the secretary of war to place a boom in North river?

115 Mr. ABEL: That is objected to as not being the best evidence, and as being immaterial and incompetent.

Q. In whose behalf were you acting?

Ans. For the individuals that composed the company; for the Nicomen Boom Co.

Q. How did it happen that you got this entirely in your own name and not in the name of the Nicomen Boom Co.?

(Objected to as being incompetent, irrelevant, and immaterial. Objection overruled. Exception taken.)

A. Well, the explanation of that is this, that Mr. Clapp informed me that there was a great deal of red tape to go through with in Washington; that each individual must be represented and that certain things must be gone through with,—I cannot explain to you what it all is, but he explained that it would save a good deal of time to have it in this shape and have it in my name.

COURT: What is the date of that?

Mr. STRATTON: The 14th day of April, 1900.

COURT: Subsequent to the permission given the corporation?

Mr. STRATTON: Yes, subsequent to that; the 15th of March, 1900. This was given subsequent to the permission given the corporation.

COURT: You mean subsequent to the filing of the plat with the secretary of the war department?

Mr. STRATTON: Yes, subsequent to that.

116 Q. State who is, at the present time, and always has been, the real owner of this permit?

Mr. ABEL: We make the same objection that it is not the best evidence.

COURT: That would be a conclusion of law, I suppose, from the testimony.

Q. Now, you may state, Mr. McGowan, what, if anything, has been done by the Nicomen Boom Co. in pursuance of its original intention to extend and enlarge the original boom to meet the requirements of the logging business on North river.

Mr. ABEL: That is objected to unless it is limited to the time prior to the organization of the defendant company.

(Objection overruled.)

COURT: Let it be considered as the time of the completion of this original boom.

Q. (Question repeated.)

A. To explain, I might say that the output from the loggers the first year was somewhere about seven million feet.

Q. The first year commenced with the fall of 1900?

A. Yes sir; I think that was about when it was. I would not be certain, though.

Mr. ABEL: We would suggest that that is not responsive to the question.

(Witness continuing:) Then the next year there was something over eight million feet, I think. Well, I thought that my boom was plenty large to hold all the logs that would probably be down the next year.

117 Q. That is, you mean what would be down the third year?

A. Yes, and the next year we had about twelve million feet, I think. Perhaps less, but about that.

Q. Now, the third year commenced in the fall of 1902?

A. 1902; yes, sir. Now, in 1902 I learned that there was large preparation being made for a large output in 1903, and I thought that if the output kept increasing at the same ratio that it would be necessary to enlarge the boom and extend it up the river. I had it in my mind and made preparation to enlarge it. My foreman, after working out the logs of 1902, had some little fishing interest on the Columbia river, and wanted to go down there, and I told him that we would have to get piling and prepare to extend our boom, and he told me at that interview that there would be eighteen or nineteen million feet, and that our boom would be inadequate—that we could not hold them.

Q. When did he say this, that eighteen or nineteen million feet would come down the river—during the season commencing when?

Ans. Commencing this fall.

Q. You mean the fall commencing 1903?

Ans. Yes sir; this fall.

Q. Now state to the court as near as you can the date of the interview you said you had with your boom tender, the superintendent superintending the extension of this boom for this year.

Mr. ABEL: We would like it understood that we not only object to the competency of this evidence, but also that it is purely hearsay. It is evidence respecting which no refutation could

118 ever be made.

COURT: Yes, I understand, but let it go in under objection, and you may take your exception.

Q. Now, you may state, as near as you can, the date of the interview that you said you had with your boom tender, or superintendent, as to the extension of this boom this year.

Ans. Well, I think that was in either May or June. There was no plan at that particular time as to how it was to be done.

Q. That was in May or June of 1903?

Ans. 1903, yes sir—but we talked it over. I told him that the boom must be enlarged because there would be a larger demand on it. And soon after that I made inquiry as to where I could get piling.

Q. Piling for what purpose?

Ans. Piling for extending the boom.

Q. Well, now, what preparations did you make for the extension of this boom?

Ans. Well, I made inquiry about a man engaged in the logging business, to get out such timbers, and I applied to Captain Bell, of the Launch Arthur, as to whether he would furnish them. He was in this towing business.

Q. Furnish what, Mr. McGowan?

Ans. Furnish piling. And he told me that they were not getting out many piles in the river that he ran, that is the Nasel river. But he said he knew a man that was in the business who was then getting out logs, I think, on the Nema—one of those rivers anyway—I have forgotten the name. He said that he was a very good man, and a reliable man. He gave his name as Cole, of the shingle
119 mill. And after he introduced me I told him I wanted him to get me some 300 piles right away.

COURT: When was that?

WITNESS: This was in—well, I can't remember—Mr. Welsh has some of the notes.

Q. Well, was it some time before the commencement of this suit that you saw Mr. Cole?

Ans. Oh, yes, it was before that.

Q. State whether or not it was after the formation of this defendant boom company.

Ans. It was early in August, I think, in 1903. He told me that he was engaged in the business, and he would like to furnish me with the piling. I asked him how soon he could furnish the same, to that number. He had them already cut, as I understood him, only he had to put them into the water. Well, he agreed to have them—I could not tell you as to the date, but I can tell you from a letter. Will you please let me have that letter, Mr. Welsh?

(Hands witness letter dated August 22, 1903, signed by A. J. Cole, Mgr., addressed to P. J. McGowan.)

Q. Do you recognize that letter, Mr. McGowan?

A. Yes sir.

Q. Did you receive that letter?

Ans. I received this letter, yes sir. I received this letter in explanation of the reason that he could not comply with my request to deliver the logs. He received the order—it must have been on the 14th or 15th of the month. This is the answer to that request.

120 COURT: I suppose the letter itself is only for the purpose of refreshing the witness's memory as to the date?

Mr. STRATTON: We would like to offer the letter, to show that Mr. McGowan had an agreement for the getting out of this piling.

COURT: It may be admitted then.

(Same is read in evidence, and marked "Plaintiff's Exhibit 'J.'")

Q. State whether or not you told Mr. Cole, at the time you made the agreement with him, by which he agreed to furnish you with the piles, what you wanted the piles for.

A. I told him I wanted the piles in order to extend my boom. I wanted some short ones and some 35 feet long. He told me that he had some of the 35 foot ones, and I told him that they would answer. You see, the bed of the river was not an even depth.

COURT: I think that the witness has answered the question fully, and you need not take up any time for further explanation.

Mr. STRATTON: I thought there might be a conflict between Mr. McGowan and Mr. Cole as to whether these piles were ordered for the extension in the main river or in the slough. I wanted to show that.

COURT: Very well, proceed.

Q. You may go ahead and answer the question fully.

A. I told him, as stated, that I wanted to extend my boom to the—and the next I knew about the piles was in being informed in my absence that there was a telegram from Mr. Cole stating
121 that there would be a further postponement. What it was I do not know, because I have never seen the telegram.

Q. But that telegram was after the receipt of Mr. Cole's letter of August 22nd, was it not?

A. Yes sir.

Q. I suppose the original telegram could be secured could it not, unless it has been destroyed?

Ans. I tried to get it, but I could not get it. But we received such a telegram at the office.

Q. Now, state to the court what was said to you when you made the contract with Mr. Cole, if anything, concerning long and short piling.

Ans. Well, I just stated what my impression was, that the short piling would suit in the shallow water, and that the long piling would do for the deeper ground—that was the intention, or the design.

Mr. ABEL: We object to his stating what the intention was; let him state just the conversation.

WITNESS: Well, that is a fact, they *they* were to be used in the construction of the boom.

Q. What, if anything, was said to you at that time concerning the length of piles that you wanted?

A. Well, has not that been answered?

Q. I do not think so, specifically, Mr. McGowan.

A. Well, the urgency for the piling was for the boom.

Q. Was the length of the piling mentioned?

A. Yes the length of the piling was mentioned, but it was men-

tioned incidentally. I could have taken forty foot piling,
122 but I understood Mr. Cole to say that he had both kinds; that thirty-five and forty foot piling—and I told him that they would answer for the work intended.

Q. State whether or not, at that time, or at any time, you made any statement to Mr. Cole to the effect that you intended to use those piles in the slough?

A. No, I did not. I made no such statement to him.

Q. Well, were those piles ever delivered to you or the company by Mr. Cole?

Ans. No, not that I know of. He did deliver, after the other boom company had started, a few, I believe, but I do not know how many, The foreman would know I suppose, but I do not know how many, but it was very few. But, there was a further—my foreman informed me that he——

Mr. ABEL: We make the same objection.

(Witness continuing): That he approached him on the same subject.

Q. You need not make any state- of what your foreman said to you unless Mr. Cole was present. Who was the foreman you meant?

Ans. Mr. Dan Lynn.

Q. Now, do you know any further facts in connection with the piling that Mr. Cole agreed to deliver to you?

A. Only from my foreman, that he did not deliver them.

Q. Well, you know yourself that he did not deliver them until after the defendant company commenced operations, don't you?

Ans. Yes sir.

Q. Now then, on what date did Mr. Cole agree to deliver this piling to the company?

123 Ans. Does not this letter show when the order was delivered?

Q. Generally, but it does not show the exact date.

A. I don't think that I can give you the exact date.

Q. Well, were they to be delivered immediately?

A. Immediately, or just as soon as they were cut and could get them out. That was the order, because it was urgent, and I wanted them to go to work immediately. I had a driver all ready to do the work.

Q. You say you had a driver already on the ground to do the work?

Ans. Yes sir; ready to drive the piles when they arrived.

Q. I think you said you had a conversation with your foreman, Mr. Lynn, to the effect that the boom would have to be extended for this fall's operations?

A. Yes sir; we were talking about the logs that would come down this fall.

Q. Now, what if anything, was done in pursuance to that conversation with your foreman, later on?

Ans. In pursuance—well, I tried everywhere, sent him everywhere I could think of where there might be any piles.

Q. You sent Mr. Lynn?

Ans. Yes sir; Mr. Lynn, the foreman—I sent him to get piles, becoming satisfied that there was something wrong as to the delivery of the piling, and I became satisfied that we would be left in the lurch, as the saying is, by this man Cole. I began to realize that very clearly, and hence I sent my foreman out to find piling. He informed me later that he had found some at the Simpson Lumber Co., I don't remember the exact number, but it was quite
124 a bunch of piling. I told him to secure them, and he did so.

COURT: When was that?

WITNESS: That was—well, the man who did the work will have to do that. I can't be specific as to the date.

Q. Well, what, if any instructions, did you give to Mr. Lynn concerning the construction of the boom this fall?

Ans. I gave him my plan of doing the work, and engaged a surveyor so that we might run on an exact line; I got it run by Mr. Clapp; that is in the original plat. I had the survey made, as we would rather be on the inside than on the outside of the original survey.

COURT: Which survey do you refer to?

WITNESS: To the original survey made by Mr. Clapp.

Mr. STRATTON: You mean as represented on this plat?

A. Yes sir; as on this map, "Plaintiff's Exhibit "B" from the secretary of war.

Q. Now, what did Mr. Lynn do in pursuance to those instructions that you had given him to go ahead and construct the boom?

Ans. Well, I think he will have to tell you about that.

Q. Do you know about the date that you gave him instructions to go ahead and construct or enlarge the boom?

A. I do not. Things were done in a hurry—done impromptu, and I made no notice of them.

Q. State whether or not it was before the incorporation of the defendant company.

Ans. Oh, yes; this last work was while they were working.

125 Q. I am speaking now of your instructions.

A. The instruction was to put in the piling, drive the piling, as near as he knew on the line, so that he would not get over—or so that there would not have to be a change of the work. I had the line surveyed so that he might know the exact course.

Q. Who was this surveyor that made the survey—was it Mr. Hunt?

Ans. It was Mr. Hunt from Montesano.

Mr. ABEL: Was this after the suit was brought?

WITNESS: Was this after the suit? No they were driving at this time.

Q. The defendant company was incorporated about the 26th, or the 25th of August, was it not?

Ans. Yes sir.

Q. Now, with reference to that date, when did you first give Mr. Lynn, your foreman, instructions to construct an extension and enlargement of your boom—either before or after?

Ans. Why, before, by the notice. You will notice the date of

that letter. I was in consultation then about this matter with my foreman.

Q. Well, now state, Mr. McGowan, what you intended to do in reference to the extension of that boom this fall?

A. I believe I bought some four hundred—I believe my foreman informed me that he had bought four hundred piles. Mr. Cole delivered something over a hundred I think.

Q. How far up the river was it your intention to extend this piling this fall?

Ans. If there was no interruption I would extend—in fact,
126 I did not consider that it would be needed more than 1000 feet, perhaps.

Q. How far did you have the surveyor survey the extension up the river?

Mr. ABEL: We make the objection that it was after this suit was brought, and the testimony of Mr. Hunt——

COURT: I understand, and objection may be noted and you may take your exception. The court is not passing at all on the relevancy of the testimony at this time.

A. I had him survey to the end of the original plat.

Q. Did you intend to construct the boom through that entire length?

Mr. ABEL: That is objected to as being leading.

COURT: The question is leading.

Q. How far did you intend to construct the boom?

A. Well, I expected, ultimately, to drive the piling to the end of the boom extension.

Q. Do you know, Mr. McGowan, what the cost of your boom was as it is now constructed?

COURT: Are you including any work done since the commencement of this action?

Mr. STRATTON: No, only as to the construction,—the cost of the original construction.

A. Not the cost of location?

Q. Yes, including the cost of locating, and all the expense up to the time the boom was constructed.

A. Well, the cost of the construction and the land was about $16,000.

127 Q. Who was the owner of the land upon which the boom is constructed?

Mr. ABEL: That is objected to as not being the best evidence.

COURT: I fail to see how that figures in this case. You will eliminate any upland, and confine it to the shore land, do you not?

Mr. STRATTON: Yes sir. I will withdraw that question anyway. It cuts no figure one way or the other. The deed is in evidence.

COURT: That shows the owner of the land and the price of it.

Q. Mr. McGowan, are you familiar with North river?

A. I think so, yes sir.

Q. You have a cannery over on North river, have you not?
A. Yes sir.
Q. Just opposite your boom?
Ans. At the lower end of the boom.
Q. What kind of boats or craft now navigate that river, up as far as the uppermost extremity of your propo-ed extension—what kind of water craft navigate that river?
A. I suppose any craft on the river, excepting perhaps the Astoria. I don't know whether she will go up there or not. She would on high water, I know; but I think any of those boats can go way above the original boom.
Q. You are speaking now of the original boom,—the uppermost extremity of the original boom?
Ans. Yes sir.

128 Q. And the Astoria, which you do not know whether it could go up there or not, but which you think could go up there on high water, is an ocean tug, is it not?

A. Yes sir.
Q. About what is the draft of the other vessels that you mention?
Ans. Well, they are from four to six and a half feet.
Q. Vessels that ply on the river and harbor here generally and vessels and boats that carry the United States mail?
Ans. No, I don't know about the Reliable, I don't know what she draws. She might not be able to go up there. She has been up to the cannery, but how much further up she might go I do not know.
Q. Now what character of boats can navigate North river as far as the uppermost extremity of your proposed extension?
Ans. I answer by saying that I think any of those boats running out of South Bend.
Q. Having a draft of not over six feet you say?
A. Yes sir.
Q. Have you seen the defendant's boom since it was constructed?
Ans. No sir; I saw where they commenced construction.
Q. Do you know whether or not any of the defendant's boom is located on the tide land of the Nicomen Boom Co.?
COURT: I understand the witness to say that he has not seen any of this.
Mr. STRATTON: I asked him if he knows. He says he has not seen it since it was fully constructed, but that he did, as a matter of fact, see part of it.
A. I don't know, only so far as through my foreman.

129 Q. Very well, we will call him for that. Now, Mr. McGowan, was there any other statement that you think of material to the question at issue here, that you want to speak of?

Ans. I do not know further than the information given me by the foreman.
Q. Well, as to that, you cannot testify at this time.
A. I think that is all at this time.

Cross-examination.

By Mr. ABEL:

Q. Mr. McGowan, you testified that the Nicomen boom was built at a great expense?

Ans. At a great expense, yes sir.

Q. What did it cost to build the boom, leaving out the location?

Ans. Leaving out the location it might have cost—well, I haven't the figures, but we estimated it as costing between ten and twelve thousand dollars.

Q. What part of that was spent for piling?

A. We included piling.

Q. My question is as to what part of that ten or twelve thousand dollars was spent for piling?

Ans. I could not tell you. It was not estimated in that way. All the account was on the books, and the sum total exceeded I think ten thousand dollars.

Q. Who had charge of the purchasing of piling to be used in the Nicomen boom originally?

Ans. I had.

Q. From whom did you purchase that piling?

A. I purchased it all over—from several places. I bought some from a man named Johnson.

COURT: I fail to see the materiality of the cost of this, etc. It seems to the court that we are taking up time here to no pur-
130 pose. I understood the witness to say that he would purchase enough to extend it one thousand feet.

Q. Then you do not recollect the persons from whom you purchased the piling, the amount of piling purchased, nor the cost of the same?

Ans. Now, let me correct you, or you correct me please. Have you reference to the original work done on the boom, on our boom, or have you reference to this piling that I have recently contracted for?

Q. I mean the original work.

Ans. I could not tell you. I could tell you about that that was purchased recently.

Q. Do you remember what your boom chains cost?

A. No, I do not.

Q. Do you remember what the boom sticks cost?

A. I remember the boom chains were the heaviest item on the bill.

Q. Mr. McGowan, your memory is not very good, is it?

A. I think it is as good as ordinary.

Q. It is good on some points.

Ans. I think it is as good as ordinary.

Q. Now, did you tell Mr. A. J. Cole, when you went for this 200 piling where you were going to drive them?

A. I did, I did tell him.

Q. Did you at that time tell him that this 200 piling were to be used in the McGowan slough, so called?

A. I did not. No sir; I did not.

Q. Did you at that time tell him that most of this piling you wished to have short, because they were to be driven in the McGowan

slough, and that you only desired a few long piling to rein-
131 force the boom as originally constructed?

Ans. No sir; I did not.

Q. You did not tell him that?

Ans. No sir; I did not.

Q. Now, you say it was your intention to extend your boom, or the Nicomen boom only about one thousand feet?

A. Well, you understand——

Q. Just answer the question.

Mr. STRATTON: We insist that Mr. McGowan has a right to answer that question provided it is responsive.

COURT: He can answer.

A. Well, this one thousand feet was for present use, but the work was not thereby suspended.

Q. Were you going to build more than that one thousand feet of the proposed extension this fall, or this year?

A. According to the necessity for it, and we probably would do so.

Q. Now, answer the question, whether you were going to build more than the one thousand feet.

Ans. Well, if you are a business man, you know that when you do a certain work that you thought would answer your purpose, and you then find out at the end of it that you might double or thrible that work——

Q. My question is, were you going to build more than the one thousand feet this year?

Ans. Yes sir; it might have been three thousand or five thousand feet.

Q. What was your intention?

Ans. At this time it was my intention to build one thousand feet.

Q. But you did not build any part of that one thousand feet, did you?

132 Ans. I have got piling—and I have bought piling.

Q. Have you built any part of that one thousand feet?

A. Yes, I built some, until I was enjoined.

Q. Is it not true that you used that piling away up the river, a mile and a quarter above the old rudder boom?

A. My intention to build that boom was to commence from the bottom.

Q. Why did you commence from the top then?

A. My superintendent advised me that I should build up higher, and I followed his instructions. That was the reason why we commenced it so far—that is the reason why we commenced it up so far.

Q. In order to build this alleged extension was it necessary to get anything besides piling?

Ans. It was necessary to get boom sticks.

Q. Did you buy boom sticks?

Ans. I did.

Q. Did you before you brought this suit — did you buy them for this alleged extension?

Ans. I don't know about that.

Q. Did you make any effort to buy boom sticks?

A. I had boom sticks laid in store.

Q. Where?

Ans. Up North river.

Q. How many did you have there?

Ans. I could not tell you now. It is something between eighty and one hundred.

Q. Boom sticks vary from eighty to one hundred feet, do they not?

Ans. Yes sir.

Q. Had these boom sticks ever been in use before?

A. Certainly.

Q. What had they been used for?

133 Ans. They had been used for rafting.

Q. Those were your rafting boom sticks?

A. I was going to discontinue the rafting sticks, because I thought that the loggers did not appreciate my efforts to make it reasonably cheap for them.

Q. Now, before commencing this action, did you purchase any boom chains for this proposed extension?

A. I had those chains belonging to the boom, and I had some chain that was not yet cut up, and how much there was to it I don't know. There is considerable chain not yet cut up at the boom.

Q. Can you name one other person to whom you applied for piling before the defendant commenced to drive its boom—to whom you applied for piling for your alleged extension?

Ans. I have given you two. I have named Mr. Cole and Mr. Bell.

Q. Is he here as a witness?

Ans. No sir; I didn't deem it necessary to have him here.

Q. Is there any difference in the size of boom sticks—I mean rafting boom sticks as compared with boom sticks that are fastened and extend along the line of dolphins?

A. I am not a practical man in booming, and I could not explain to you the number of chains that would be needed to boom 500 feet.

Q. Is it not a fact, Mr. McGowan that at the time this action was brought that the Nicomen Boom Co. had no boom sticks whatever other than rafting boom sticks, and that they are entirely unsuitable for extending from one dolphin to another?

134 Ans. You are ahead of me there. I don't understand you. I understand that I can use these sticks for fastening logs in the boom. I can do that whether they are carried out in a raft or not.

Q. Now, when you saw Mr. Cole did you tell him how long you wanted your piling.

Ans. Yes, sir; I told him I wanted the piling.

Q. What did you tell him?

Ans. I told him that I wanted forty foot piling. I told him that if he had thirty-five foot that I would take some of them.

Q. Did you not tell him on that occasion that you would, or that you desired the piling to be from twenty-four feet to thirty feet long?

Ans. No, I did not tell him anything of the sort.

Q. If you only needed 200 piling before this suit was brough

why did you order 2200 after the suit was brought from the same man that had failed you first?

A. Could not I get any number of piling after I put in the first order?

Q. Why did you order that many from the man that failed you?

Ans. As soon as he failed me the second time I went and told my foreman to get piling wherever he could.

Q. Did you need 2200 piling the second time you went to Mr. Cole?

Ans. I ordered probably more than I needed, for the reason that they might come in the same manner that Mr. Cole had delivered them, and perhaps there might have been other reasons.

Q. But you were ordering 2200 from him?

Ans. No, I did not; I was very sorry for ever ordering any from him.

135 Q. Did you not go to him after he had failed you and order 2200.

Ans. I did not.

Q. Did your foreman do so at your request?

A. I don't know anything about that. If he did that, of course, he thought he was acting in good faith.

Q. After this suit was brought you went to Eli Rockey and made a contract for 2600 piles, did you not?

A. I don't know how many.

Q. Is it not a fact, Mr. McGowan, that that was for the purpose simply of keeping another boom company out of the river?

Ans. It was for the purpose of putting in our boom.

Q. And keeping another company out?

Mr. STRATTON: We object to that.

Q. Well, it is correct, is it not?

A. No, sir; I think not.

Q. You did not want another boom company, did you?

Mr. STRATTON: We object to that as being incompetent, irrelevant and immaterial—entirely so.

COURT: The objection will be sustained.

Q. Now, the only survey, with reference to this alleged proposed extension, was made after this suit was brought, and was made by Mr. Hunt, witness for the plaintiff?

COURT: That is in evidence several times.

Mr. ABEL: Very well, so long as it is clear.

Q. You had no other survey made, did you?

Ans. Yes, I have; there has been two surveys.

Q. One original one by Mr. Clapp, and one by Mr. Hunt?

A. Yes, there was three surveys in that case.

136 Q. Who made that?

A. Mr. Clapp, Mr. Hunt, and then I had Mr. Hueston.

Q. Mr. Hunt's survey and Mr. Hueston's survey were both after the suit was brought?

Ans. Mr. Hueston's was.

Q. Mr. Hunt's also?
Ans. No, I don't think so.

Redirect examination.

By Mr. STRATTON:

Q. Mr. McGowan, I show you a letter dated April 19, 1902, at McGowan, Washington, addressed to Mr. Dan Lynn, and signed by the Nicomen Boom Co., per S. H. McG.,—I will ask you if you recognize that letter as a letter of the Nicomen Boom Co.

Mr. ABEL: We object to that as being incompetent, irrelevant and immaterial, and also as being self-serving.
COURT: Did he write it or authorize it?
Mr. STRATTON: I am asking the witness if he recognizes it. If he recognizes the signature to the letter.

Q. Do you recognize it, Mr. McGowan?
Ans. Yes, I recognize that.
Q. Do you recognize the signature to that letter?
A. I do; yes, sir.
Q. Whose is it?
Ans. That of the secretary of the company, S. H. McGowan. He is secretary of the Nicomen Boom Co.

Mr. STRATTON: We offer the letter in evidence, and par-
137 ticularly that portion between the quotation marks on the first page. It is offered for the purpose of showing that we have exercised jurisdiction over that portion of North river covered by our original plat from which we now propose to make the extension.
Mr. ABEL: We would make the further objection that it is incompetent proof of that alleged fact.
COURT: Let it go in, as the other testimony has, under objection, and you may take your exception.
(Letter introduced in evidence and marked Plaintiff's Exhibit "K.")

Q. Do you know what the effect of the construction of the defendant's boom will be if your proposed extension is also constructed.
A. Well—
Q. I mean what the effect would be upon the navigability of the river?

Mr. ABEL: We would object to that, as the witness has not shown himself competent to testify.
Mr. STRATTON: We would suggest that the witness has lived there since 1852.
COURT: Let him state the situation as to what the result would be from the construction of the two booms, if he can.

A. I think the river will be completely blocked.
Q. For what distance?

Mr. ABEL: We make the same objection.

(Same ruling by the court.)

138 A. It would be about two miles.

(Witness excused.)

ELI ROCKEY, recalled on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. STRATTON:

Q. State whether or not you have been engaged in rafting logs for delivery at South Bend?

Ans. I have.

Q. For how long?

Ans. For nine years.

Q. State what the average size of those logs were compared with those coming from the North river country.

A. A very fair average.

Mr. ABEL: If your honor please, we will say now, that we do not claim that the logs from North river are smaller than those from any other part, or that there is any difference in size.

Q. State whether or not you know, from having rafted those logs, how many feet those rafts would contain, on an average, in an acre? And also how closely those logs were rafted together?

Ans. Well, you are speaking of the average raft that is towed in thirteen or fifteen sticks?

COURT: Do you mean rafting logs or booming? If he knows the catching capacity it is needless to go into the rafting capacity.

Mr. STRATTON: There may be evidence brought in here as to that.

COURT: Very well; you may proceed.

A. It would take about two and one half rafts of thirteen
139 sticks, or about two and one fourth of fifteen sticks. But thirteen or fifteen sticks is a raft in these waters.

Q. What I am getting at is how many feet there were in an acre of those rafts.

Ans. A fifteen stick raft would contain about 200,000 feet.

Q. How many rafts in an acre?

A. Ans. About two and one-fourth, or two and a half—and that is with a thirteen stick raft. A fifteen stick raft will go about two and one-fourth to an acre. That is 420 feet long and 50 feet wide.

Q. Well, that much of it would be 21,000 feet. Now, how many of those?

Ans. About 43,000 feet in an acre, of course, taking large logs they would score more, but the average run would be about from 175,000 to a thirteen stick raft, and about 200,000 feet in a fifteen stick raft, on an average throughout the year.

Q. Now, what I want is to reduce that to acres. You say one of them would be 420 feet by 50 feet wide?

Ans. Yes, sir.

Q. That would be 21,000 feet?

Ans. Yes, sir.

Q. Now, how many feet would that raft contain?
A. About 200,000, as an average.
Q. That would be about two and three-fourths rafts per acre, or 550,000 feet to the acre?
A. That is, in a fifteen stick raft? Yes, sir.
Q. A raft 420 feet long by 50 feet wide?
A. Well, not quite that.
Q. Will you figure it up, please? That is, as to how many there would be in an acre?
A. Well, it would be a little over 400,000.
140 Q. Is that a fair average?
Ans. Yes sir.
Q. That would be a fair average of all the logs rafted by you during the past nine years?
A. Yes, taking it on an average.
Q. How are those rafts made up?
Ans. They are made up by sections laid side by side.
Q. And every bit of available room is used?
A. Yes, as tight as the chains can make them. You make them as tight as you can.

Cross-examination.

By Mr. HEWEN:

Q. Now, did you ever measure an acre of those logs to ascertain how many logs there were in an acre?
A. I can measure the acre by measuring the area of the raft.
Q. You compute what an acre will hold by the size of the raft?
Ans. The raft is square and there is a certain amount of feet in a boom stick.
COURT: What is the purpose of all this testimony? Is it to show that your present boom is not of sufficient capacity to accommodate the business of the river, or that you have to extend the present boom to do the business of the river?
Mr. STRATTON: That is the purpose, your honor.
Q. Is there no material difference in the size of logs in different rafts?
Ans. Yes; there is a very material difference.
Q. What are the larger averages in the diameter, or dimensions of logs?
141 Ans. To take a large average would be forty to forty-five inches. That would be a very large average.
Q. What is an ordinary average?
Ans. That would be in the neighborhood of twenty-five or thirty inches. You see, that is the small end,—that is where we scale them. Some will run large and some not so large.

10 minute recess.

DAN LYNN, being a witness on the part of the plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By Mr. STRATTON:

Q. What is your name?
Ans. Dan Lynn.
Q. In what capacity, if any, have you been employed about booms?
Ans. Why, I have worked more or less on booms and on rivers for the last twelve years.
Q. Have you ever been in the employ of the Nicomen Boom Company?
A. Yes sir.
Q. When were you first in the employ of this company, and for how long?
Ans. The first time I was employed by the Nicomen Boom Co. was in 1892; the fall of 1892.
Q. You don't mean 1892; do you; you mean 1902?
A. Well, three years ago this fall.
Q. That would be 1900. This is 1903.
A. Yes, that is right.
Q. How long were you in the employ of the company at that time?
Ans. About seven months.
Q. In what capacity?
Ans. Working on the logs—rafting for the Nicomen Boom
142 Co. in the neighborhood of six months. And then I was manager for a month and half that season.
Q. When were you next in the employ of the company?
A. Next in November, 1902.
Q. Have you remained in their employ ever since?
A. No sir.
Q. When did your employment cease?
Ans. The 20th of March, 1903.
Q. In what capacity were you working in the fall of 1902 and the fall of 1903?
Ans. As manager.
Q. As manager of this Nicomen Boom Co.?
Ans. Yes sir.
Q. When next were you in the employ of the company?
A. From March; you mean in 1902?
Q. No, the other time you were employed.
A. The third time I was employed I was engaged, but did not go to work.
Q. Did you work any the second time you were engaged?
A. Yes, and I was paid off, and was engaged for another season.
Q. And that season commenced when?
Ans. In September.
Q. And you are still in the employ of the defendant boom company, as manager of this boom?
Ans. Yes sir.
Q. Now, you may state what, if any, instructions you received

from this company as to logs within the boundaries of its plat, but situated above the rudder boom as at present constructed?

Mr. ABEL: We object to that for the reason that the time has not been fixed, and also for the reason that it is incompetent, irrel-
143 evant, and immaterial. The instructions are not the test, but the overt acts.

Mr. STRATTON: I will fix the time as being the 15th of August, 1903.

COURT: The witness may answer.

A. You mean what instructions did I have?

Q. Yes, with reference to the logs above the sheer.

A. Well, I was to raft them all, and dislodge any or all that were caught on the bank, and drive them along with the tide. These were straggling logs that would be dragging along at the end of a freshet.

Q. What did you do in pursuance *to* those instructions?

Q. Why, we rafted—I didn't do a great deal of it—of the rolling of the banks last spring. We did some at high water, that is, high water tides. That is, rolling the logs off the banks—sliding the logs off the banks to the boom area.

Mr. ABEL: If this is for the purpose of showing the possession of the disputed area, we object to it as not being competent. We think the rolling of the logs off the bank would not be booming.

COURT: He may state.

A. I spoke of the boom area instead of a boom—instead of the boom at the present time.

Q. Instead of the extension?

Ans. Instead of the booming.

Q. Instead of the present boom?

Ans. Yes sir.

Q. Now, my question was, what instructions did you receive, if any respecting the logs that were lodged along the banks above
144 the Nicomen Boom Co.'s boom within the plat?

Ans. I had instructions from the secretary of the Nicomen Boom Co. to dislodge high logs that might be on the banks of the river and left there.

Q. Now, what did you do in pursuance of those instructions?

Ans. I went up the river, and there were no logs on the bank above the boom at that time. I left there the 20th of March, and Mr. Williams succeeded me and attended to the balance of it.

Q. While you were there did you take logs off the bank above the boom, as at present constructed?

Ans. There were none there—I went up, and if there had been any I had instructions to remove them.

Q. Now did you make a report to the company during the summer or spring of 1903 respecting the capacity of the boom?

A. Yes sir.

Q. You may state whether or not that report was in writing, or verbal.

Ans. It was verbal.

Q. You may state what that report was.

Mr. ABEL: We make the same objection, as the time place and persons present has not been fixed.

COURT: He may state if he can.

A. It was the 20th of March, 1903.

Q. What was that report, and what instructions, if any, did you receive from it?

A. Why, when I left North river, on the 20th of last March, I went to McGowan, Wash. There I met Mr. H. S. McGowan.

Q. What position does he hold?

Ans. He is secretary of the Nicomen Boom Co. He asked
145 me if I had any suggestions to make in regard to improving the boom. I said there were; that the boom needed to be enlarged to a greater extent, because I have learned from different men on the river that there would *probably* be five donkeys operated on North river this present season, and *if* they ran successfully they would have a large output of at least seventeen or eighteen million and possibly twenty million feet. If the logs would come down in a mass on the first freshet they would come into the Nicomen boom, and the outside area of it was so small that it would not hold any more than eight million if they came in on the ebb tide. Possibly there would not be that much if there was lots of drift in it. If there was twelve million or twenty million came in they would have to pass around outside of the boom and go to sea.

Q. Explain to the court how they would pass around the upper extremity of the boom and go out to sea; explain how the sheer boom works and so on.

A. I would prefer to show it on a piece of paper.

(Witness takes paper and pencil.) This is the Nicomen boom at the present time as it is located. (Witness indicates on paper.) Now, there is a sheer called a rudder, and it laps over in here, as I have indicated. These are the rudders showing here.

Mr. ABEL: Are they under water?

A. No, about half under water. They are capstans here with a chain around here, and they are pulled up taut, so that the rudder stands out in the water.

Q. And the current comes down this way, does it?

146 A. Yes, and if this was filled full from here to here above the logs—or above with logs, the other logs would pass this rudder and go back against the bank, and what this would not hold as they passed down, they would pass down outside of the boom and go to sea. This rudder is digestible—I mean adjustable. If you slack this chain here the rudder goes out in the current, and if you pull it tight the rudder acts against the current and throws the boom out. If you slack the chain the rudder drops back to the bank.

Q. Then this sheer boom of the plaintiff company is on a pivot at the bank, and swings on that pivot.

Q. Now explain the difference between the sheer boom and the one that is constructed by the defendant on their boom, if you know.

Ans. Their rudder is stationary. It is not a rudder—it is simply a sheer driven with piers or dolphins and pilings. Their boom is on the other side, and they have driven right across back there.

Q. What did they drive across there?

Ans. They drove piling within fifteen feet of the bank at medium low water, and at low water it would be about four and a half feet.

Mr. ABEL: Are these your measurements?

WITNESS: Yes sir.

(Continuation of answer:) Now, there is a boom stick—or when I was there this boom stick was resting on the bank and they were attached together, and ran clear down the entire length of the dolphins so as to close it all up. I had a skiff that I was rowing in across there.

Q. When was this?

Ans. That was about two weeks ago, and the entire river
147 was closed at that time, and this boom stick was lying on the bank on the left hand side of the river.

Q. Now, what would be the result if the boom of the defendant company would become full?

Ans. If the boom of the defendant company would get full, it would simply fill the river.

Q. You mean above the boom?

A. Yes.

Q. Then, if I understand you, if a sufficient number of logs came down to fill the defendant company's boom and then more came down the river it would block the river entirely above the boom?

Ans. Yes sir.

Q. Would there be any way of navigating the river above the boom until those logs were cleared out? Then, in that respect it differs from the boom of the Nicomen Boom Co.?

Ans. Yes sir; they simply drove dolphins of piling across the river, and there is about fifteen feet of water at medium tide, and four feet and a half or five feet at extreme low tide.

Q. You mean from the left bank?

Ans. Yes sir; the left bank coming down.

COURT: You have reference to the dolphin now?

WITNESS: It is not a cluster of piling, but it is only one pile. But it is a part of series of piles and dolphins which consist the permanent structure.

Q. Now, while we are on this subject, state whether you have measured the depth of water between their inner pile or pier and the shore?

Ans. I have.

148 Q. At what state of the tide?

Ans. At high tide and at extreme low tide.

Q. At the extreme low tide what was the depth that you took?

Ans. Four feet right at the piling.

Q. Was that at strictly low tide?

Ans. Yes sir; right at the piling at low tide.

Q. Now, two feet in from—or two feet in shore from the piling, what was the depth?

Ans. About a foot and a half or two feet.

Q. Now, at half tide—I think you said you took the other measurement?

Ans. Yes sir.

Q. What were the depths?

Ans. At half tide there was about seven or seven and a half feet. I measured it standing up in the boat and with an oar.

Q. Where was it seven and a half feet—was it at the pile?

Ans. No sir; it was about two feet and a half or three feet from the piling.

Q. Six feet in to the shore from the piling what depth?

A. I think the water there was five feet.

Q. I would like to show you a map. Just examine this plat which is marked "Plaintiff's Exhibit "G," and I will call your attention to a row of dolphins extending diagonally across the river, which consist of a sheer of the defendant's boom, and I direct your attention to the gap between the letter "A" in ink, and the letter "B" in ink, and ask you to explain what that gap is—if it does exist there, and to what it is connected—if it is connected at all between the dolphins there?

A. Well, when I was there I walked all the way, and one of the defendant's men was there to help me dislodge logs that were
149 caught there. The river was entirely closed when I was there.

Q. Closed between the gap?

Ans. Yes sir. At all times since that it was closed.

Q. Was the gap between "A" and "B" so closed?

A. I could not say that there was a gap. There was a string of sticks all the way down, and I walked clear up to the end.

Q. You walked from "C" in black ink, up the row of dolphins to the defendant's boom, and up to the upper extremity of their sheer?

Ans. Yes sir.

COURT: That is, you mean to say, coming down the river?

WITNESS: Yes sir; and then I pulled up river towards the piles across here.

(Witness indicating on the map.)

COURT: You say the boom sticks were between the dolphins?

WITNESS: No sir; on the inside, on the way down. The dolphins were on the left hand side of the boom sticks.

Q. Now, were those permanent structures each side of the sheer, and which you say were permanently connected with the main boom?

Mr. ABEL: We object to statement of counsel.

Q. Were they connected in any way permanently with the shore?

Mr. ABEL: We object to that as calling for an opinion of the witness.

150 Let the witness state what the connection was, if any.

A. The boom was connected to the last piling here opposite, and it was lying on the bank. At high tide this last piling was about twenty feet out. I was with Mr. Hunt when he made that survey.

Q. Was the boom stick connected with the in-shore pile lying on the bank at high tide?

Ans. Yes sir.

COURT: Could you pull a boat up the river, in view of the piles being there—that stick there?

WITNESS: No sir.

Q. Now, have you seen the construction of their sheer since it was finished?

Ans. Yes sir; the last time I came down, they had the boom closed—were just closing.

Q. When was that?

Ans. I could not give the exact date.

Q. How many days ago?

Ans. About seven days ago.

Q. Have you seen that boom since that time?

A. No sir; I have not.

Q. Have you seen the sheer since that time, either?

A. No sir.

Q. Now, what effect will the construction of the plaintiff's extension and of the defendant's boom have, if any, upon the navigability of the river?

Mr. ABEL: That is objected to, as it is not shown that the plaintiff has an extension, or ever will have one. There have never been any plans submitted to the court respecting that. And we object for the further reason that it is incompetent, irrelevant and im-
151 material.

(Objection overruled. Exception taken.)

Q. What, if any effect, will the construction of the plaintiff's extension and the construction of the defendant's boom have upon the navigability of the river?

Mr. ABEL: We make the same objection.

(Same ruling.)

A. Why, it would be entirely closed.

Q. What effect will the construction have, if you know, of the defendant's boom upon the access to lot 7 in section 23, and to the navigable portion of North river?

Mr. ABEL: We make the same objection.

(Objection overruled. Exception taken.)

A. Do you mean the present boom?

Q. Supposing it is not extended at all?

Ans. It has no effect on the navigation to speak of. It takes one half of the river, and the other half is practically open, or can be opened at any time that orders are given to do it. It can be opened in two minutes after a man gets there.

Q. Just look at this plat, Mr. Lynn. Do you see that row of dolphins?

Ans. Yes sir.

Q. These are the dolphins that were completed when this map was

made. Now, I say, after that boom is constructed, can persons desiring to navigate from lot 7 get out to the navigable portion of that river?

Mr. ABEL: That is objected to as being leading.

Mr. STRATTON: We acknowledge that it is a little leading.

152 COURT: Where is this lot 7 that you are speaking of? Is it above the end of this defendant's boom—the upper end?

Mr. STRATTON: It is above the upper end of the boom as at present constructed.

COURT: You mean of the defendant's boom?

Mr. STRATTON: No, of the plaintiff's boom.

COURT: How about it as to the defendant's boom?

Mr. STRATTON: It is below the defendant's boom.

COURT: I will permit the question.

Q. Supposing the defendant's boom were full of logs, could you have access, or could you not have access to the lot 7, to the navigable portion of North river?

A. You mean if this was full of logs?

Q. Yes sir.

Ans. No sir. There is a bar down here and you cannot get to it at low water.

Q. About where? About here on the plat?

Mr. ABEL: We object to that as being leading.

Q. Now, could one navigate the river from lot 7 above their sheer boom—above the defendant's sheer boom?

A. If there were logs in the boom?

Q. Yes sir.

A. If it was full of logs up to here, they could not. When I was there there was no logs in it, but if it was full of logs you could not navigate it. I could not myself—I had to drag my boat over the sticks.

153 Q. In other words, this boom that they have constructed there shuts people off from navigating the river to lot 7?

Mr. ABEL: That is objected to as being leading.

Mr. STRATTON: We admit that it is a little leading.

Q. Now, we will go back to the report that you made last spring. What instructions did you receive, if any, when you made that report?

Ans. When I made the report that the boom should be enlarged on the 20th of March?

Q. Yes.

Ans. Why, H. S. McGowan informed me that they would have to enlarge it this season, and he suggested that he would take it up with P. J. McGowan. He was then at the house, and he sent for me, and I explained this to him, the necessities of enlarging it. And he said that he would enlarge it this present season. I suppose that that meant this summer.

Q. When, with reference to this conversation that you have just mentioned, were you engaged as manager of the boom?

Ans. Then.

Q. At that time?

Ans. Yes sir.

Q. And did you afterwards commence working for the company in pursuance to that engagement?

Ans. Yes, but I did not do any work for the company until the 1st of September. There was not anything more said about it until in January, when Mr. McGowan came up, or rather met me at their cannery at Ilwaco.

Q. That is, you have reference to Mr. P. J. McGowan?

A. Yes sir. He asked me if he could depend on me going to North river this fall, to take charge. I said that I would go
154 to North river and take charge of the fishing traps and the fishing interests, but did not agree to have anything to do with the boom. He said that he did not know as he would do any fishing.

COURT: Just confine the testimony to the boom.

(Witness continuing:) I did not say at first that I would come, but after we got done talking I promised to go.

Q. Now, what, if anything, have you done respecting the enlargement and extension of the plaintiff's boom since that conversation with P. J. McGowan last June?

Mr. ABEL: That is objected to unless it is limited to the time prior to the incorporation of the defendant company.

COURT: If he did, let him state.

A. On the 1st day of September I started to North river to take charge of the enlarging and driving of the boom. I was instructed that I could find out whether there were any piling to operate with when I got to Nacota. I could find out from Nacota from Mr. Bell, and I met him there and he informed me that there was a raft of piling going into North river the next day—he said that there was 200 piling going to Mr. McGowan, and that the piling had come from Mr. Cole. Mr. McGowan had told me that he had bought that from Mr. Cole, and they were supposed to be at the boom when I left Ilwaco, and I telephoned from Nacota that the piling would be there at the boom. I got on the steamer Reliable and came to South Bend and met Mr. Williams the m[illegible]ger of the Nicomen boom, and he informed me that the[illegible]as no piling there.
155 So I then telephoned from South Bend that there was no piling, but that they had already ordered the men to come to North river.

Q. Who ordered?

Ans. P. J. McGowan.

Q. To do what?

Ans. To drive the piling in the enlargement of the boom.

Q. How many men?

Ans. Four.

Q. Where was this extension to be put?

Ans. It was to start from the present boom and continue on up the river.

Q. How far?

A. Up to the end of their plat. That is the way it was put to me.

Q. Now, you say that you did not find any piles at North river. What did you do?

Ans. I came to South Bend on the 3rd of September, and I met Mr. McGowan and the men. I informed them there were not any piling there, and he said to go back out and drive the range beacons; with the largest trap piling that we had. I suggested that we could drive the range beacons with light piling, because they were easily handled and you could only drive one or two piling at a time.

Q. What do you mean by range beacons?

Ans. Well, for instance, in the bend of the river.

Q. Can you look at plaintiff's exhibit "G" and identify the range beacons that were afterwards driven?

A. I could not say now how these are, and I could not say when these were made. Now, these range beacons, for instance, there is a piling driven here, (witness indicating) and one there, and then there is a straight line range from that.

156 COURT: When did you drive those range beacons?

WITNESS: Started to drive them on the 8th of September, 1903.

Q. Now, as to these other light red circles—this line extending from the sheer of the plaintiff's present boom along the dotted red line represents those range beacons, do they not?

Ans. Yes sir; those little dots.

Q. Now, you say that you commenced to drive those beacons on the 8th day of September. What do you mean by that; what did you do?

Ans. Well, after we got the driver so that it would operate we went up the river and drove a beacon on each angle, wherever there would be an angle.

Q. Did you drive these beacons throughout the entire length of the proposed extension? Where did you commence to drive those beacons, at the upper end of the proposed extension or at the lower?

Ans. At the upper end.

Q. And drove down stream?

Ans. Yes sir.

Q. Now prior to that time did you drive any beacons or pilings for the proposed extension, or attempt to?

A. No sir; we could not drive because the pile driver was defective.

Q. Then you did attempt to?

Mr. ABEL: That is objected to as leading.

COURT: The witness can state what he did.

A. Yes sir.

Q. State what that attempt was.

157 Ans. Why, we got to North river on the evening of the *evening of the* 3rd.

Q. That is, after you had left South Bend, after seeing Mr. McGowan?

Ans. Yes, and got to North river on the evening of the 3rd and started to get the driver in order to drive the piling—brought it around and put water in the boiler, and when we did so we found that it was leaking and we had to pump it out.

Q. You say "Brought it around," where did you bring it from?

Ans. From the moorings near the cannery.

Q. Whose was it—who did it belong to?

Ans. It was Mr. McGowan's, or the North river Booming Co's., I think.

Q. What day was that now that you took the driver out and took it around from its moorings?

Ans. It was the 4th day of September.

Q. What part of the day?

Ans. In the afternoon. We got it out in the afternoon.

Q. Now, where is the cannery located with reference to this proposed extension?

Ans. It is about a mile and a quarter down the river.

Q. You mean from the lower extremity of the proposed extension?

Ans. Yes sir.

Q. What was your purpose in getting out that pile driver?

Ans. Why, the pile driver hadn't been used—the water was out of the boiler—pipes were rusted more or less, and there were no lines on it. We had to put the lines on it, fill the boiler with water and also put wood on it.

Q. Who told you to do this?

158 Ans. I was ordered to do it by Mr. McGowan.

Q. What was your purpose in doing it?

Mr. ABEL: We make the same objection as before.

COURT: The same ruling will stand.

A. We were going to drive piling for the extension of the boom.

Q. What was the matter with the boiler?

A. It had rusted through on the bottom where it had rested on the bed plates.

Q. Did you know the condition—did you know that that was the condition of it before you commenced to use it on that day?

Ans. No sir.

Q. What was the result?

A. Why, I came to town and informed Mr. McGowan that the boiler had to be condemned, and he suggested that it was late in the season and that he would have to send to McGowan, Wash., and get a pile driver boiler from McGowan & Sons on the Columbia river.

Q. Was that done?

Ans. Yes sir.

Q. When did it arrive at North river?

A. I think it arrived on the 6th, though I am not positive.

Q. You mean on the 6th of September?

Ans. Yes sir.

Q. When it came, what did you do with it?

A. We put it on the driver, filled it with water and went to work with it.

Q. And then it was that you went to driving these beacons—after that boiler came?

Ans. Yes sir.

Q. Now, you are acquainted with Mr. Frank Hobi, who is alleged to be manager of the defendant boom Co.?

159 A. Yes sir.

Q. How long have you known him?

Ans. I have known him for about three years.

Q. Did you ever have any conversation with him respecting the proposed extension of the plaintiff's boom before the defendant company was organized?

(Question withdrawn.)

Q. Have you ever had any conversation with Mr. Hobi respecting the propesed extension of the plaintiff's boom?

A. No sir.

Q. Did you not in last February have a talk with Mr. Hobi?

Ans. Yes sir.

Q. You may state what that conversation was. Tell the court what was said.

Ans. Mr. Hobi had come to me and wanted me to go up the river and drive his logs down. I told him that I would write to the Nicomen Boom Co. and get orders and submit them to him when they came. He said that that was all right, and that he would also write. So I wrote to the Nicomen Boom Co. and told them what he said.

Mr. ABEL: We object to that as not being the best evidence.

COURT: The objection will be sustained, unless the letter cannot be produced.

Q. You may speak of your conversation with Mr. Hobi now.

A. I told him that I would write to the Nicomen Boom Co.

Q. Did you write?

Ans. Yes sir.

Q. What other, or further, conversation did you have with

160 him.

A. When I got the answer I met him about a week after and told him that we would drive his logs out at his expense, that were above the boom area, but that at the end of the season when we got done rafting that we would clean the entire river up. And I told him that if we undertook it that every little freshet that came up would take off all the logs that would happen to be coming down; that we would be working on the river all the time.

Q. Now, as manager of that boom out there, and from your experience in it, can you say what the catching capacity per acre would be in a boom of that size? That is, the number of feet?

Ans. Yes, I have estimated it a number of times.

Q. Did you ever have occasion to ascertain the number of feet of logs in that boom at any time when it was full or nearly full?

Ans. I did last season.

Q. How full was the boom at that time; that is, how far did the

logs extend from the lowest extremity of the boom up the stream? I am speaking now of the main boom line?

Ans. Why, it was full for about three thousand feet.

Q. Well, then, how many feet was it to the upper extremity?

Ans. About 275 or 250 feet.

Q. About how wide was the main boom at a point about 250 feet below the upper extremity?

Ans. About 120 feet.

Q. Then there is a space in the upper extremity of that boom 175 feet long and 125 feet wide that is occupied by logs?

Ans. Yes sir.

161 Q. Now, as to a part of those logs; were any of them in the slough?

Ans. Yes sir.

Q. About how many acres of the slough were filled with logs?

Ans. I could not say how many acres. It is about 500 feet wide and the slough is about 200 feet wide, and I think it was about 500 feet in length up the slough to where the boom sticks were across.

Q. Well, that would be 100,000 feet,—square feet of the slough area that was covered by a part of this same lot of logs, and that would be approximately two and a half acres, counting 43,560 feet to the acre. That would leave a vacant space 175 by 120 feet at the upper extremity of the boom and would equal about one acre, would it not?

Ans. Yes sir.

Q. Now, how many feet of logs were in that mass?

A. A little over eight million feet.

Q. Did they lie on the surface, or were they piled up underneath the surface of the water?

Ans. All on the surface for about two hundred feet from the rafting gap of the boom, and from there up they were piled to the bottom one on top of the other.

Q. Now where is the rafting gap with reference to the lower extremity of the boom?

Ans. Right at the first point of the boom, or what is termed the mouth of the boom.

Q. Then, is that the very lowest extremity of the boom?

A. Yes sir; but up in here (indicating on map) they were lying on the surface. They were that way 250 or 300 feet up; I
162 don't know just how far. And then from here up they were piled to the bottom of the river.

Q. Then assuming that the boom contained fifteen acres, there were fourteen acres of logs in it?

Ans. Yes sir.

Q. And there were two and a half acres, approximately in the slough?

Ans. Yes sir.

Q. Then there were sixteen and a half acres of logs?

A. Yes sir.

Q. And in that sixteen and a half acres of logs there was a little over eight million feet?

Ans. Yes sir.

Q. And the logs were piled clear to the bottom of the river from about two hundred feet above the lower extremity of the boom, as far up the river as the logs were at that time?

Ans. Yes sir.

Cross-examination.

By Mr. HEWEN:

Q. Mr. Lynn, at this time you are speaking of this main boom, did the logs extend—or you speak of the logs extending up there about three deep at the lower part.

Ans. I did not say three deep. I said that they were on the surface at the lower part or mouth of the boom.

Q. Where was it that they were piled three deep?

A. I didn't say three deep at any place.

Q. Didn't you say that they were piled three deep on top of each other—or that they were piled on top of each other?

Ans. Yes sir.

Q. Where?

Ans. About 250 feet from the rafting gap on the mouth of the boom.

Q. How far did they extend up the river?

163 A. There is a flood tide gap here about 250 feet from that. I did not measure it, but I just fixed the distance by counting the boom sticks and they are sixty feet.

Q. How far would it be from that point—what would you estimate it?

Ans. Well, I find no point here at the end about 250 feet from this closing gap.

Q. Well, I thought you pointed?

Ans. I don't know the scale of the map. You see there is a flood tide stick that goes across the river 120 feet long, and it has to swing down on the ebb tide. Then about 250 feet from there the logs were piled—the boom was full for about 250 feet from that point from——

Q. From the point where the boom closes?

Ans. Yes sir.

Q. Then about 250 feet—then there was about a 250 foot vacancy about that point where the logs come in?

A. Yes sir.

Q. How far up the slough did that go?

Ans. About 500 feet.

Q. Can you indicate on the map, without measuring it, about where it was?

Ans. Oh no, I could not do that.

Q. You could not do it, even if it was on the map?

A. No sir.

Q. Indicate on the map about where you think it extended up the slough. Can you find the slough that goes into the McCowan boom on the map? Was there a slough there?

Ans. I don't know this map. Your attorneys have introduced it in evidence here.

Q. You don't have any idea then whether it was here at this place or farther on up?

164 Ans. I can't swear from this point, but it was about 500 feet. It was about 500 feet from the mouth of the slough.

Q. You are familiar with this ground, are you not?

A. Yes, sir.

Q. You have been over it a good many times?

Ans. Yes, sir.

Q. All of that eight million feet of logs came down at one time?

Ans. They didn't all come on one flood?

—. ——.

A. No, sir.

Q. How do you raft logs? Do you wait and hold the logs for the whole season, or do you raft them out from time to time as they come in?

Ans. We raft them out when we get orders from the mills and from the owners of the logs or the loggers.

Q. Do you not carry on rafting operations pretty nearly the whole winter and spring season after you commence to receive the logs?

Ans. Yes, sir, as they are ordered.

Q. At no time then is the entire output of logs for the year in the boom?

Ans. No, sir.

Q. About how many freshets do you have to bring down the logs?

Ans. There is generally one large freshet that brings part of it. I know we had three or four last year. We have had a number this season.

Q. Logs come down on those freshets?

Ans. Sometimes they come and sometimes there are none.

Q. During the whole year?

Ans. With one freshet, if the logs are jammed, they do not come.

Q. But ordinarily logs come on each one of those freshets?

Ans. Yes, sir; some logs.

Q. Do you clean out the entire river at the end of the season

165 as you promised Mr. Hobi?

Ans. I did not until the season was done.

Q. Do you know whether the plaintiff corporation cleaned it out?

Ans. Yes, sir; there wasn't anything there when I came back.

Q. Did you examine it?

Ans. Yes, sir.

Q. Were there any logs on the bank there at that time?

A. No, sir.

Q. Were there any logs of Mr. Hobi's there at that time?

Ans. Yes; but not on the bank. Might be on the bank now at low water. There are two logs that were left there in a pocket.

Q. Within the boom, I understand?

Ans. Yes, sir.

Q. Now, those logs were rolled off the bank that you speak of; that is the bank which corresponds or goes in the direction of the

boom; that is, it is above the limits of the boom—those are the ones that you rolled off, were they not?

Ans. We did not roll them; I did not.

COURT: He has not testified that there were any logs on the bank above the boom. You asked him if there were any logs of Hobi's on the bank, and he has said that there were two or three in the boom there.

Q. Now, during the time you have been superintendent of this boom, or acquainted with its operation, has it not been the practice of the Nicomen Boom Co. to roll off the logs which had first been received by it within its boom, and not to molest or remove the logs that lodged along the banks above its boom as constructed?

A. Why, the practice depended upon who was in charge.

Q. When you say you were in charge?

A. When I was in charge I would go up the river, and
165 I suppose I would roll the ones outside first.

Q. Now, in regard to this proposed extension, and your going over there on September 1st, what was the character and size of the pile driver proposed to be used to drive the piles?

Ans. You mean what was the size of the pile driver?

Q. Yes.

Ans. Forty feet long and I think twenty feet wide. I don't remember about the width of it.

Q. Was it adapted for more than the driving of fish trap piling?

Ans. It would drive any piling twenty inches in diameter.

Q. What was the weight of the hammer of this pile driver?

Ans. I don't know. The engine was seven by ten, and if it will lift a hammer—I know that an engine seven by ten will lift the hammer at 100 pounds.

Q. Was it not the pile driver that McGowan & Sons theretofore had been using in operating the cannery, in carrying on the fishing business; had it not been used only for the purpose of driving fish traps, and was it not a little pile diver adapted only for the driving of fish traps?

Ans. I don't know what it was adapted for, but the Nicomen Boom Co. or the North river Booming Co. drove out trap piling with it a year ago this last fall.

COURT: What is the materiality of this?

Mr. HEWEN: We think it is material for the purpose of showing our claim that the piles driven by this plaintiff in this action about the commencement of this suit and since, have been small fish trap
piling, which are much more easily driven than the piles
167 used in boom construction.

COURT: Suppose that is so?

Mr. HEWEN: Then it shows that they were not proceeding in good faith with that extension.

COURT: If they had any right to drive piling you may proceed.

Q. What is the usual diameter of fish trap piling?

A. They vary from twenty-two inches to twenty-five inches down to four and a half inches. Now, I am speaking of trap piling. I

am accustomed to trap on the Columbia river and on the Willapa Bay. On the Sound they use piling a great deal larger.

Q. What is the size of piling used usually in the construction of logging booms, such as would be needed in the main body of North river?

Ans. Why, they generally range from twenty-one to twenty-two inches down to fourteen inches.

Q. Is it not a fact that piling used for boom construction is twice the general average of piling used for trap construction?

Ans. Well, it depends a great deal upon the ground that you are driving in. If you are driving in work where you have hard ground, and you have ordinary light hammer and a light engine, and you have piling that is too large you can't fix it to make it stand well. You cannot get it into the ground far enough to stand the stream—it is apt to break; that is, you cannot get it into the ground far enough to stand the breaking strain or spring. Whereas, if
168 you use smaller piling you can drive it down so far that it will spring, and you can put more in. By using more piling you can make the beacons stronger.

Q. Would it need or require any larger piling to stand the floods coming down North river than would be required in the slough which does not receive the main current of the river, but only receive the tidal flow?

A. That would depend upon the kind of ground, etc., that you had to drive in, and naturally the piling, if you had hard ground to drive in, and you could use eight inch piling, you could drive nine in a cluster in place of five, and still get just as much power out of your beacon or as much holding strain as if larger piling were driven the same depth.

Q. What is the average size of the piling in the main part of North river as heretofore driven, and not as extended in the boom of the plaintiff corporation?

A. And the plaintiff's?

Q. Yes, sir.

Ans. I never measured them—I don't know.

Q. You have passed and repassed them a good many times, have you not?

Ans. Yes, sir.

Q. And have you no estimate to put on the diameter?

A. Yes, I should say, that I received a raft from Mr. Cole; I scaled that raft.

Q. Well, I will ask you then as to what the average size of those piles would be that were driven in the main part of the boom?

Ans. You mean in the Nicomen boom?

Q. Yes, sir.

Ans. They range from twenty-one inches, I should judge, to down about thirteen inches.

169 There are not many of the thirteen inch piles. Of course, I am just guessing at it. I have not measured them. I would not care to bind myself as to the exact size.

Q. Now what is the average size of those piling that were driven

in September for the plaintiff corporation in this proposed extension in North river? What size were they?

Ans. They were about from eight to nine inches.

Q. Have there not some of them floated out—did not some of them float out subsequent to that time?

A. Not of the small ones; some of the larger ones floated out.

Q. If the larger ones had been properly driven with a pile driver, with proper power for boom driving, would they have floated out?

Ans. I did not say that they all have floated out. There are two out, and I don't know how they came out, and I would not care to say just how they did come out, because I do not know.

Q. What did Mr. McGowan say in this conversation that you speak of, just before you came over here, probably in August, in regard to the operations of the defendant company, as affecting the operation of his?

Mr. STRATTON: There is no evidence that Mr. Lynn said anything about that.

Mr. HEWEN: Well, we want to know if he did.

COURT: I do not think that would be proper cross examination.

Q. Did he or did he not refer to the proposed boom of Mr. Hobi's in August of 1903?

Ans. No, sir, not in August.

Q. When did he first mention it?

170 Mr. STRATTON: We object to that as being incompetent, irrelevant and immaterial, and not proper cross examination.

COURT: The objection will be sutained and you may take an exception. It would make no difference anyway.

Q. Who put in the five donkey enignes that you have testified about, and that you informed Mr. McGowan that he would require an increase in the booming capacity?

Q. I understood that Mr. Hobi was going to put in two.

Q. Who were the others?

Ans. Mr. Chambers had two, or would have two this summer season, and Mr. Morgan was expected to put in a donkey. That was just reported among the loggers.

Q. Was it or was it not at the freshet time that you went up this river, when you said this gap from the sheer boom of the defendant to the main boom was closed?

A. Twice it was freshet time, and three times it was not. I believe I was there more than twice in freshet time but I am not sure. I was there every day when there was supposed to be logs coming down the river.

Q. Now, was the boom completed at this time?

A. Yes sir; supposed to be. With my experience and the way it was fixed, I considered it was completed.

Q. Did it have a pile driven to attach this pile that you speak of to when it was open?

Ans. Yes sir.

Q. At that time?

Ans. Yes sir.

Q. At that time was the lower end of the defendant's boom closed?

Ans. I would like to go over this with you again. I would
171 like to make a correction,—there is a difference here in the bend of the river.

Q. You don't know whether the boom was completed then at that point, or not?

Ans. I can say that earlier there were two piling driven on the right hand side of the river.

Q. You mean coming down or up?

Ans. Coming down.

Q. Were they within reach of the boom stick from this place?

Ans. From the looks of the map I think they were just opposite.

Q. Was the defendant's boom at that time closed at the lower end of it?

Ans. The last day they were just bringing the sticks that cross the mouth of it.

Q. Was it closed?

Ans. No sir; I went through there—It was the only way that I could get through.

Q. Did you ever measure the gap across there from one point to another?

Ans. No sir.

Q. If that gap was 150 feet or thereabouts, would it not be sufficient to allow navigation, or the passage of logs necessary at that locality?

A. Between the bank and the first beacon, you mean?

Q. Between the beacon and the main boom; between the sheer boom and the main boom. If a gap existed of a width of 150 feet would it not be sufficient for navigation; that is from "A" to "B"?

Ans. You mean with nothing in between?

Q. With nothing between.

Ans. Why, would they be straight opposite one another?

Q. Well, you say——

Ans. Well, there would be just a small break in there.

Q. I am speaking now, as shown on your own map here, if
172 the distance of 150 feet was there, would it not be sufficient?

Ans. It would be sufficient if it was taken out straight across the river, but if it was straight up the river, you could not take a boat or anything.

Q. Could you not turn in 150 feet—would that not be sufficient?

Ans. Not there, no.

Q. Could you not pass up this way and pass over across the other way?

Ans. Not with anything in tow.

Q. Is not that 150 foot space through the main boom, and between the end of the rudder boom of the plaintiff and its main boom?

Ans. I could not say. The Nicomen Co.'s boom is supposed to be let loose when there is anything to go through, to give the entire space.

Q. As a matter of fact, does it?

Ans. Yes, when it is not closed.

Q. Has it ever been done?

Ans. Yes sir.
Q. This year?
Ans. Yes sir.
Q. As a matter of fact, is it let loose when anything is going up, to give the entire space?
Ans. When any one wants it.
Q. Has it ever been done?
Ans. Yes sir.
Q. When?
Ans. When the piling came in.
Q. Did not Charles H. Potter find it closed in September?
A. He had to cut the sticks adrift.

Mr. STRATTON: We move to strike out the answer as being entirely immaterial, and as not being proper cross examination.

COURT: I do not think the mode of construction of the
173 plaintiff's boom is a question in this case. The objection will be sustained. It is taking up a good deal of time without any purpose.

Redirect examination.

By Mr. STRATTON:

Q. Who, if any one, was with you driving the piling for the beacons in the extension of the boom, if you know.
A. Mr. Matt Barber, J. J. Odendale, Chas. Hendrickson, Thomas Lahti, May Maupin.
Q. How long a time will ordinarily elapse for logs which are consigned to the plaintiff's boom, and which are caught in the defendant's boom, before they can be delivered from the defendant's boom to the plaintiff at its boom?
A. Why, it would depend.

Mr. ABEL: We would like to make this objection that it contemplates a delivery. It is merely to pass and not to deliver.
Mr. STRATTON: I will modify the question.

Q. How long will it be before the logs consigned to the plaintiff's boom can be passed from the defendant's boom, ordinarily, if they are caught in the defendant's boom?
Ans. After they are caught,—well, it depends now in what locality of the boom,—what position they have in the river. If they are the last logs I think they would have to wait until the boom was cleaned out before they could get them at all. Or, if they were in the middle they would then have to wait until half of them were rafted out.
COURT: Would that not be the case wherever the booms might be operating?
Mr. WELSH: Not where there is more waterway.

Q. I will ask you why that time would elapse?
174 A. Because there is no way they could get out the logs after they have let them into the boom. At that particular point in the river they do not have any flood tides to speak of until

in the winter season, and they would have to take logs out in the front, and let them down to the rafting gap in the boom.

Q. At that time then, in which they could be passed to the lower boom, or the plaintiff's boom, it might be a short time or it might be a long time, depending entirely upon the rafting of the defendant?

Ans. Well, it would be a certain length of time any time. They could only get so many logs through the gap on a tide or in a day. And then, that is, if they worked to their full capacity and the water is favorable. Otherwise, it would depend a great deal on the water and how many were operating.

Q. In your opinion, would they be passed to the lower boom within a reasonable time?

Mr. ABEL: We object to that as calling for a conclusion of the witness.

(Sustained. Exception allowed.)

Q. Well, now, how long a period would elapse—or how long would it take?

Ans. Well, from my experience on the river—Well, where would the logs be located?

Q. Say, in the middle.

Ans. Well, from my experience on the river, it would probably be three months. And those located at the upper extremity of the defendant's boom, it would possibly be four months. That is the way we have operated the boom there. With reasonable water, and by towing south, you could tow them. They cannot tow every day in there, and they cannot raft every day. And taking my experience through, that has been my experience with the Nicomen boom.

Q. Where is the stronger current? On the Nicomen Boom Co.'s side or on the defendant's side of the river?

A. That I should judge—there are parts of it I should judge that are about equal, and then there are parts of it where it is stronger. It is stronger I think as a rule, on the right hand side of the river. The bends are all on the right hand side.

Q. Now, where is the deep water in North river where these booms are proposed to be built—is it on the left hand side or the right hand side?

Ans. It is on the right hand side, at the point at the upper or extreme end of the boom. Of course, farther up there is a place where it changes.

Q. How far have you ever measured it? How far is it from the lower extremity of the defendant's boom to the upper extremity of the present works of the Nicomen Boom Co.; that is, the original Nicomen boom, the one built in 1900—the one that you built in 1900?

A. Why, I measured it one day in 1900, but I could not say positively the distance.

Q. Have you any memorandum to which you could refer to refresh your memory that you might have made about that time?

Ans. Nothing, only that there were two of us that measured it.

Q. Did you not make an affidavit as to that, on the same day that you measured the distance?

Ans. Yes sir.

Q. Do you know the day that you made that measurement?

Ans. It was in September, but I don't know the day.

176 Q. Was it about the 22nd of September?

Ans. I would not care to state.

Q. Well, I will show you the affidavit.

Mr. ABEL: We would object to his using the affidavit.

COURT: He may use it to refresh his memory.

Q. Just examine the affidavit for the purpose of refreshing your memory. (Witness does so.) Now, after examining that affidavit, for the purpose of refreshing your memory, can you state from your recollection, how many feet you ascertained—or what you found the distance to be between the upper part of our sheer boom and the lower extremity of the defendant's boom as then constructed?

Ans. Yes sir.

Q. How much?

Ans. 366 feet.

Cross-examination.

By Mr. ABEL:

Q. Did you measure that yourself?

Ans. Yes; two of us.

Q. And who was the other man?

Ans. I cannot recall.

Q. Where did you measure it? Did you measure it along the bank?

Ans. Yes sir; we tied one end of our measurement string to the bank.

Q. You had a string?

Ans. Yes sir.

Q. Who was with you?

Ans. I cannot remember the man's name.

Q. Did you ever take that measurement, Mr. Lynn?

Ans. Yes sir.

177 Q. Along the bank?

Ans. Well, no, we took it in a boat.

Q. You had one boat?

Ans. Yes sir.

Q. Now, speaking of the time that it would take to pass logs from the defendant's upper boom to the plaintiff's boom, you say that it would take from three to four months?

A. If the logs were located in the boom at those points that I have stated at that time.

Q. Do you know the capacity of the defendant's boom?

A. No sir; not of the defendant's boom.

Q. I mean of the new boom?

Ans. No sir.

Q. You have no idea as to how many logs it would hold, and you therefore have no idea as to how long it would take to empty that boom, have you?

Ans. I did not figure on what logs were in the boom when I made the statement. I was figuring on what come down the river,—the amount that would come in a year.

Q. Into the Nicomen boom, and not into this boom?

A. Any boom, anything that would hold.

Q. In other words, your estimate as to the time that it would take the new boom company to pass logs to the old boom, is based upon the length of time it has taken you to empty the Nicomen boom in the past?

A. No sir; not to empty.

Q. To pass logs from it then?

Ans. In one instance, where the logs consigned were in the rear, and in another instance where the logs that were consigned were located in the middle of the general mass that comes down the river in a season.

Q. You mean it could not be done anywhere within that 178 time?

Ans. No.

Q. With due diligence could you not have done that quicker than you have stated?

Ans. I do not think so. If the water would permit boats to tow every day, and the mills received them and the mill people would keep the boom supplied with boom sticks, it could be done a great deal faster.

Q. And then you are assuming that it would take the new company four months to pass logs to the old company, and in doing so you can assume that the mill companies would not keep you supplied with boom sticks; and that the tow boats would not come to take the logs?

A. The tow boats cannot take logs when there is a freshet, or when it is storming.

Q. Those conditions do not always exist, do they?

A. We have a running season that is practically the same every year. There is very little difference in this locality.

Q. Does the length of delay in passing logs from one boom to the other depend, to any extent, upon the capacity of the upper boom?

Ans. No sir.

Q. Does it depend upon the amount of logs in the upper boom?

Ans. Yes, it does.

Q. In what way?

Ans. It does not really depend upon the amount of logs in the boom, but it depends upon the amount of logs in front of the logs that you are trying to get out.

Q. Suppose they are all intermingled. That is the way logs come down the river, is it not? The brands are not separated, are they?

Ans. No sir.

179 Q. They are driven down the river pell mell?
Ans. Yes sir.
Q. I will ask you if there is any other way of passing logs from the defendant's boom, that is, the upper boom, without emptying the boom entirely?
Ans. Yes sir.
Q. Or without emptying all the logs below those intended to be passed?
Ans. Yes sir.
Q. What is that method?
Ans. There are several ways.
Q. What are those ways? I wish the court to know if there are other ways.
Ans. It depends. Are you speaking of just the locality of the defendant's boom?
Q. I am speaking of the defendant's boom.
A. Well, I will say then, or would reduce that to one way; one way in my judgment in that vicinity.
Q. What is that way?
Ans. To place a rudder at the extreme end and pass them by when they come in.
Q. Have you ever noticed the plan of construction of the defendant's boom?
Ans. Yes sir.
Q. Is it not a fact, that the sides of the defendant's boom, the boom sticks which connect the dolphins extending up and down the river, are so arranged that an opening can be made into the side of the boom to take out logs, and is not that a very usual way of passing logs which are not intended for the boom into which the logs have come, or in which the logs are located?
Ans. No sir.
Q. That is not the usual way?
180 Ans. No sir; it is not.
Q. What other booms have you worked on besides the Nicomen boom?
Ans. I have worked on a boom at Cathlamet.
Q. Any others?
Ans. Yes, I have worked on other booms on salt water but not on fresh water.
Q. What booms?
Ans. I worked on a boom at North Shore, I did all the rafting there in the summer season.
Q. Did you ever work on any body of navigable water on which the booms were located one above the other?
—. ——.
Q. You have never had the experience then of passing logs from an upper boom to a lower boom?
Ans. Yes sir.
Q. Where?
Ans. I have, but not on a fresh water stream.
Q. Have you on a tidal stream?

Ans. Yes sir.
Q. On what stream?
Ans. On the Walacut.
Q. Where is that?
Ans. On the Columbia.
Q. When was that?
Ans. That has been about eight years ago.
Q. How long were you there?
Ans. I was there one winter.
Q. Was there an incorporative boom there at all?
A. No sir.

(Witness excused.)

W. L. WILLIAMS, called as a witness on the part of the
181 plaintiff, after being first duly sworn, testified as follows:—

Direct examination.

By Mr. JOHN WELSH:

Q. Where do you reside?
Ans. Ilwaco, Wash.
Q. How long have you resided in Pacific County, Wash.
A. Since 1878.
Q. Are you acquainted with the Nicomen Boom Co's. boom in the North river in this county?
A. Yes sir.
Q. Are you in the employ of the Nicomen Boom Co. at this time?
Ans. No sir.
Q. Were you ever in the employ of the company, and if so when?
Ans. I accepted a position there—took a position on the boom on the 19th day of last March, 1903.
Q. In what capacity?
Ans. As superintendent of the boom.
Q. The boom on North river?
Ans. Yes sir; the Nicomen boom.
Q. During the time you were superintendent, state what instructions, if any, you received from the officers of the Nicomen Boom Co. relative to taking logs from the banks of that river above that—where their boom was then constructed.
A. I wrote to Mr. McGowan to find out and be instructed on this subject, and he came over there on that matter and some other things. Mr. Hobi and Mr. Roberts claimed that it was our duty to go to the extreme tide water and drift the logs down.
Q. That is Mr. Hobi who is secretary of the defendant company?
Ans. Yes sir. I did not know whether I should or not. So I wrote to him to come over and I asked him about it, and I told him that there were some logs that they claimed were in Smith's Slough. I told Mr. McGowan that they had told me that those logs were there.
He thought that they did not belong to the Nicomen Boom
182 Company at all, because they had never been down near that way before. But any logs that were driven on the river as

far as his land extended he considered it our duty,—as it would not cost much, to bring them down into the river. But there was not any there.

Q. Did you have instructions to dislodge logs from the bank above the boom?

(Objected to as being leading.)
(Objection overruled. Exception taken.)

A. I did in a way.

Q. Where did Mr. Hobi want you to take the logs from?

A. He said he considered it our duty to take them from where they left quick water.

Q. You mean where they hit the high tide water?

A. Why, yes sir.

Q. Do you know how many miles above the Nicomen Boom Company's boom that would be?

Ans. No sir; I don't know.

Q. State whether or not you knew at that time what you learned as to any obstruction that was to be made—or any enlargement of the boom by this company?

A. He told me at the same time he was there in May, that he had been advised that there would be at least ten million more feet put in on North river this year than ever before, and that we would have to make extensive preparations for that. Also that he would have to set a back boom back in the slough in order to have storage in which to store them.

COURT: When was that?

WITNESS: In May of this year.

Mr. WELSH: Were you then superintendent in charge of
183 the boom there?

WITNESS: Yes sir.

Q. What did he say to you as president of the company as to your receiving piles from Mr. Cole for the purpose of making any extensions to the boom?

A. He told me at that time that he was going to give contracts for short piling for the slough and also long piling for the main river. I knew nothing more about the piling until a few days before I received them. I then sent another letter to Mr. McGowan——

(Objected to as not being the best evidence.)

COURT: He need not state what was in the letter.

Q. You may state whether or not you had instructions to receive any piles that were delivered by Mr. Cole?

A. I had instructions to receive them and take care of them, about two hundred.

Q. I will ask you as superintendent of that boom over there at the time you were over there, did you know, and were you informed by the officers of the Nicomen Boom Co. that they would extend their boom up the river?

(Objected to as being leading.)

Q. State what instructions you received from the officers of the Nicomen Boom Co. relative to extending their boom?

A. I had no instructions from them about extending the boom. He told me it was their intention to do it.

Q. Did he tell you anything about enlarging the boom?

A. Yes sir.

Q. I will ask you if you knew that they intended to do it?

Mr. ABEL: We will make the same objection.

184 (Objection overruled. Exception taken.)

A. They told me that they were going to, yes sir.

Cross-examination.

By Mr. HEWEN:

Q. Did you drive any logs that were above the booms as constructed?

Ans. The original boom?

Q. The old boom.

Ans. Why, I did, as to two or three logs that were drifing in the river,—that is all that were there.

Q. Was not his instructions to you to dislodge and roll in all logs that come within the limit of the Nicomen boom, but not to go above the river for that purpose,—I mean above the boom for that purpose?

Ans. No sir; he told me that it was not our duty to drive the river above.

Q. Did he direct you to take logs that were above the boom?

Ans. On his shore,—yes sir; loose logs.

Q. Did he not say to you that they had no jurisdiction above the constructed boom, and that they had no authority?

A. I believe that I recall quite plainly that he did not consider that, but that logs that did not come into the boom, or any loose logs along the bank, that they were put to be put in.

Q. Now, in regard to this extension of the boom, did he not say to you that they would need to move the back boom of the slough and make another extension?

A. He told me it was necessary to set the—or to set it back in order to sort logs after coming into the boom. He certainly told me that the boom would have to be extended up the river in order to receive that ten million feet more or logs that were coming

185 down.

Q. Did you not tell me on Monday of this week in my office that he said nothing about extending the main boom in the main river, but it was only a question but that he would have to set the boom back into the slough?

A. No sir; I don't remember anything of the kind.

Q. Do you remember any conversation that we had at that time?

Ans. I do.

Q. Do you remember my asking you as to what he said as to extending the boom in the main river?

A. Yes sir.

Q. Do you remember what your reply was to that?

Mr. WELSH: That is objected to as being incompetent, irrelevant and immaterial, for the reason that the witness has not qualified himself to answer.

(Objection overruled. Exception taken.)

A. I told him the same as I have told you here, that I knew nothing about it only what he told me.

Q. Did you not tell me that he said nothing about extending the boom up, but that it was only a question of a back boom up the slough?

(Objected to as incompetent, irrelevant and immaterial. Objection overruled. Exception taken.)

Q. Did you not state to me at that time and place that Mr. McGowan said nothing to you about extending the boom in the main river, or enlarging the boom in the main river, but only mentioned that he would have to extend the back boom of the slough farther back?

Ans. I certainly did not, Mr. Hewen.

186 Q. About the 5th day of September, 1903, did you not state to Mr. J. J. Brimp, upon the presentation to you of an affidavit in regard to the rolling of logs from the bank above the boom, as originally constructed, that the fact stated in the affidavit was practically true,—or that they were true, but you declined to make the affidavit because that you had never had any trouble with Mr. McGowan, but that you would state the truth about the facts stated in the affidavit,—that the facts stated in the affidavit were true?

Mr. WELSH: We object, because the place and persons present have not been shown.

Q. Did not that conversation take place at Ilwaco, with the person that I have named?

Ans. I did not make any such statement. I simply positively refused to sign the affidavit.

Q. Did not the affidavit contain this statement, "That said P. J. McGowan, as president of the said company, instruct affiant not to pay any attention to any logs along above the boom on said river for the reason that said boom company claimed no jurisdiction on the river above said boom"?

Mr. WELSH: That is objected to as being incompetent, irrelevant and immaterial.

COURT: Let him answer if he can.

A. I have forgotten the words exactly, but it was entirely too rank to sign.

(Witness excused.)

CHAS. HENDRICKSON, being called on the part of the plain-
187 tiff, after being first duly sworn, testified as follows:

Direct examination.

By Mr. JOHN WELSH:

Q. What is your name?
Ans. Charles Hendrickson.
Q. Where do you reside?
Ans. At McGowan.
Q. In whose employ are you now?
A. In the employ of the Nicomen Boom Company.
Q. About how long have you been in the employ of the Nicomen Boom Company?
Ans. Since the 3rd of September.
Q. You may state what you have done for this company since you have been in their employ?
A. I was hired on the 2nd of September to go on North river and work on a driver.
Q. When did you commence to extend, or commence the driving of this boom?
Ans. I think it was on the 8th of September,—but I was not on the driver on the 8th and 9th; I went away to bring the boiler over.
Q. When did you start in?
Ans. I started in on the 8th to drive.
Q. What did you do after that; how did you discover the boiler was bad?
Ans. We filled it with water and started to get up steam, and found that it was bad?
Q. On what date was that?
Ans. That was on the 4th or 5th of September of this year.
Q. What day was it that you fired up the boiler and found that it was defective; what boiler was it and to whom did it belong?
Ans. It belonged to Mr. McGowan.
188 Q. How did you discover that this boiler was defective?
A. We could not get up steam.
Q. That was on the 4th?
Ans. It was on the 4th or 5th, I think.
Q. What was the object in using this boiler on the driver?
Ans. It was used to drive the boom.
Q. Where did you drive these piles?
Ans. Up above the old boom.
Q. In the North river?
Ans. Yes sir.
Q. Is that what you intended to do on the 4th, when you discovered that the boiler was defective?
A. Yes sir; that is what I did.
Q. That is what you were told to do?
A. Yes sir.
Q. Who was with you?
Ans. Well, those other boys who were there on the drive.

Q. Are you familiar with North river?
Ans. Not very much.
Q. How many times have you been in the vicinity of this boom—of the defendant's in North river?
Ans. Not before this last fall.
Q. How many times this fall?
Ans. Been there ever since the 3rd of September.
Q. Do you live at North river now?
Ans. Yes sir.
Q. And you have resided there ever since the 3rd of September, this year?
Ans. Yes sir.
Q. You are familiar then are you with the depth of the North river at this point?

(Objected to as being leading and suggestive.)
COURT: Objection will be overruled.
(Exception taken.)

189 A. Not very much—I have not sounded the water there very much.
Q. You know the depth at the different places at the boom, do you not?
Ans. Yes sir.
Q. Now, tell the court what those depths are.
A. Well, it is according to the tide.
Q. Tell us how you found it?
Ans. Well, may be there is six or seven feet at low water at one place and perhaps eight or nine and so on.
Q. Is there any place there where it goes dry?
A. Well, yes, a little farther up above the old boom.
Q. Now, when the Nicomen Boom Company—you say that you have seen it? How long since you saw it?
A. Day before yesterday.
Q. How long since you have seen the defendant's boom?
A. I have not seen it since the day we finished there. I think I have not seen it in a month and a half.
Q. Well, have you been up recently to the end of the boom?
A. No; I have not; not this month.

By Mr. MARTIN C. WELSH:

Q. You know where the boom—the North Shore boom is?
A. Yes sir.
Q. Now is the depth of the water—or I will ask you if you can state the depth of the water at low tide?
A. Well, I presume low tide would be four or five feet.
Q. Well all the way?
A. No inside of the pile.
Q. I mean outside of the pile.
A. I have not sounded it.
Q. Do you know where the boom of the North Shore boom company is?

Ans. Yes sir.

190 Q. Do you know where their last pile is, the one near the shore?

Ans. Yes sir.

Q. About how far is that pile from shore at low tide—from the bank?

Mr. ABEL: We object as the witness has not shown himself competent to testify as to that.

(Objection overruled. Exception taken.)

A. Twelve or fifteen feet at the middling tide.

Q. What would it be at low tide and what would it be at high tide?

A. Well, I could not tell you as to high tide. Of course, the bank is sloping.

Q. Did you not tell me this afternoon, Mr. Hendrickson, that at some time you had seen it at that time?

COURT: The court will not wait for the objection to that. The court will not permit a question of that sort.

Q. When were you last up to see the boom of the defendant?

Ans. Month and a half ago.

Q. What was the stage of the tide then—was it high or low, if you know?

Ans. It was high water, I think, or almost.

Q. Have you seen it at low water?

Ans. Yes sir.

Q. At the time you saw it at low water, what was the depth of the low water in the most shallow place outside of the boom? Now, I mean by that, outside of the boom on the left hand side of the river coming down stream?

A. About four feet.

Cross-examination.

By Mr. ABEL:

Q. Now, you were at McGowan on the 2nd day of September of this year?

191 Ans. Yes sir.

Q. You were in a considerable of a hurry, were you not?

A. No sir.

Q. When you came over, did you go right to South Bend?

A. Yes sir.

Q. How long did you stay there?

Ans. I left that same night.

Q. And the next day you went over?

Ans. No, I left for North river that night.

Q. And reached McGowan's house that night?

Ans. Yes sir.

Q. And that is just below the Nicomen boom, is it not?

A. Yes sir.

Q. How many days did you stop there?

Ans. I am stopping there yet.
Q. You didn't go up the river that day?
Ans. No, sir.
Q. When did you first go up the river after reaching McGowan's house?
Ans. Well, I think it was the 10th.
Q. And when you went up there on the 10th you found the defendant, the North Shore Boom Co., driving piling?
A. Yes sir.
Q. Where did you get the piling that you people were going to drive on the 10th of September?
A. Well, they were large trap piling.
Q. Where were they located—where were they when you went over there? Where did you find the piling?
A. On the bank there.
Q. They were sorted and piled up on the bank there—they had been used before had they not?
Ans. Yes sir.
192 Q. They were not new piling?
Ans. No sir.
Q. They had been used in fish traps, had they not?
Ans. I guess they had been used, but I don't know how many times.

Redirect examination.

By Mr. STRATTON:

Q. State whether or not you tried to go up North river outside of the piling which had been driven by the defendant for its boom?
Ans. Yes sir.
Q. Now, when was that?
Ans. I can't remember when it was.
Q. About what time was it with reference to the time you drove?
Ans. It was about September.
Q. About what time in September?
Ans. About the middle of it.
Q. Was it in the early part of it?
Ans. Yes sir.
Q. Were you able to go up the river?
Ans. Hardly.
Q. Why not?
Ans. There was no water.
Q. What kind of a boat did you have?
Ans. A dingy.
Q. And you say that you were not able to go up past the boom?
Ans. I went past, but it was pretty hard.
Q. What did you have to do to get past that boom?
A. Well——
Q. Could you row past?
Ans. Yes sir.
Q. How much water did your boat draw?

A. About seven or eight inches.
193 Q. And you had a hard time to get over the gravel bar?
A. Yes, sir.

Recross examination.

By Mr. ABEL:

Q. Where is that gravel bar located?
Ans. Well, there is one right across Smith's slough on this side.
Q. And there are several farther up?
Ans. Yes, sir.
Q. And right above the defendant's boom there is a ripple for half a mile long that runs dry at low tide, is there not? and is that the one you refer to?
A. No, there is one on the right hand side going up, by Smith's slough.
Q. And the reason you could not go up with a small boat was because the tide was too low and the gravel bar showed?
Ans. Yes, and because we could not go out into the river between the piling and the bank.
Q. If you had gotten on the other side from that gap you could have gone through?
Ans. There was no gap there, because the boom was not finished.

(Witness excused.)

H. S. McGOWAN, called as a witness on the part of the plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By Mr. STRATTON:

Q. What position, Mr. McGowan do you occupy with the Nicomen Boom Co?
Ans. At the present time I am secretary of the company.
Q. Did you see your manager, Dan Lynn, some time during the spring of this year at McGowan, Wash., or at Ilwaco?
A. Manager of what?
194 Q. Manager of the Nicomen boom?
Ans. He was superintendent; yes sir, I saw him.
Q. About what time of the year?
Ans. I saw him a number of times, and I think the last time I saw him on boom matters, I think, was in the closing up of his reports on the last year's work. That is to say, the work of 1902, and 1903, and during the winter, and it was about the 1st of May, I believe.
Q. At that time did he make a verbal report to the company?
Ans. Yes, he made a report of his seasons work on the boom.
Q. At that time were there any suggestions made by the officers of the company regarding the extension of the boom?

Mr. ABEL: We make the same objection to that.
(Same ruling. Exception taken.)

A. Yes sir.

Q. You may state to the court what was said at that time on the subject.

Ans. In the first place, Mr. Lynn made his report and turned over a number of his records in reference to the season's work on the boom. He went on to explain how the boom had operated, and the successes and difficulties that he had had during the season, and also——

COURT: Just come down to what talk there was if any regarding the boom.

A. Well, Mr. Lynn stated that it was to the best interest of the company to extend the boom up so as to give it more carrying capacity.

Q. What was said by you on the part of the company, or
195 both of you at that time?

Ans. Well, we inquired into why this was necessary, and he stated that there would be probably fifty per cent. and possibly one hundred per cent. more logs coming down this year than the year before, and that the boom was none too large, if large enough, to be safe for the work it would have to do.

Q. Do you know how many logs had come down here before?

A. Well, there had been, up to that time approximately——

Mr. ABEL: Just a moment now. That should be of your own knowledge.

A. Yes sir; approximately about ten million, and there were some others came down later on.

Q. Do you know how many came down later on that year?

A. I could not say exactly, but I think about in the neighborhood of about two million feet.

Q. You mean later on?

Ans. In speaking of later on I mean later on than the time he left the boom. You understand he left the boom quite a long time before he made the report.

Q. What if anything was done toward the extension of the boom?

Ans. Well, there were arrangements made later on to get men, and to arrange——

Mr. ABEL: We object to the witness continuing unless the time be fixed.

Q. When were those arrangements made?

Ans. Well, the ones I recall more distinctly were around about the fore part of August—from the 1st to the 5th of August.

Q. You may state to the court what those arrangements were.

Ans. The president of the Nicomen Boom Co., P. J. McGowan, came to me——

196 Mr. ABEL: We make the same objection.
(Objection overruled. Exception taken.)

(Witness continuing:) Well, he came and asked me about it; I had heard that there were certain men in the employ of the company that were skilled in the use of pile driving and pile driving

work in general, and we wished to secure their services, and he came to me about the 1st or the 5th of August to know if he could get certain of those men. I informed him that he could get them immediately if he required them, but that if he did not need them right at once, I would like to use them, one or two of them until the end of August, when the fishing season was closed, and he said he could get along without them until that time.

Q. Were those men subsequently furnished by P. J. McGowan & Sons?

Ans. Yes sir; they were.

Q. Have you seen the boom of the defendant since it was constructed?

Ans. The boom of the defendant's?

Q. Yes sir.

Ans. Well, I have seen a new boom above the Nicomen boom.

Q. When?

Ans. I saw it yesterday.

Q. Did you consider that boom a safe structure for the catching of logs coming down North river?

Mr. ABEL: That is objected to as calling for a conclusion of the witness.

COURT: Objection sustained.

(Exception taken.)

Q. You may describe that structure to the court.

Mr. ABEL: That is objected to as being cumulative.

COURT: He may describe it as expeditiously as pos-
197 sible.

A. It is a structure built in the water in the bed of the river, and is composed of piling. Most of the piling of the main race-way of the boom, of the main part, is used to catch and hold the logs, and is built of dolphins really, driven into the bed of the stream, and some of them there are four and five, and some of them as high as six in the dolphin—that is four and five piles in one dolphin, and all being bound at the top. And then there is a row of boom sticks lying along the inner side of the boom race, and an area extending from the lower end of it pretty nearly to the upper end, to within perhaps 100 or 150 feet of the sheer, which is at the upper end. There are one or two points along the sides of the race-way where there are two boom sticks parallel to each other. There are one or two places that have been bracketed together by timbers placed cross ways between the two boom sticks, and that makes two boom sticks,—that is, one on each side of these dolphins. That is the way that I remember it, but all the rest is a single line of boom sticks.

COURT: This has reference to the inside of the main boom?

WITNESS: Yes sir; on the inside of the dolphins. The sheer or lower end of the sheer, is located about the center of the river at that point, or at the upper end of the race-way, and angles inward until it comes nearly to the left hand bank coming down. And then there

are also single boom sticks, that is, a single line of boom
198 sticks laid along the upper side of that sheer. The sheer is composed of clumps of piles driven in the shape of dolphins and bound together at the top, with the exception of the extreme upper one, which is a single pile. Then all along the full length of the boom, practically,—I mean, these dolphins, all along the full length of the boom, practically, are a considerable distance apart. They are probably forty to fifty feet apart,—that is, that much distance between the dolphins.

Q. That is, for the full length of the boom?

A. Yes sir.

Q. What can you say respecting the strength of this boom?

Ans. Well, the strength of the individual part—the individual dolphins, so far as being placed to stand or hold the logs, would depend altogether on the character of the timber, and as to the depth of the piling.

Mr. ABEL: We would object, for the reason that the witness has not qualified himself to answer as to this.

Mr. STRATTON: We would suggest that he is secretary of the boom company.

COURT: The secretary of the boom company need not necessarily know anything about the construction of the piles.

Mr. STRATTON: The witness has described the new boom, and now I ask him for the strength of it—or if the strength is sufficient to stand the strain it would be subjected to.

WITNESS: I might say that I have superintended the driv-
199 ing of structures built on pilings, consisting of wharves and fish traps and fish wheels for the last fifteen years. And I have had experience during that entire time in the putting in of structures built out of piling to resist pressure.

COURT: You may proceed.

Q. Now, you may proceed with your former answer.

A. The strength of those piers, taking them individually would depend upon the size of the piling and the character of the bottom or bed that they were driven into, and the depth to which they were driven. I have no means of knowing how deeply they are driven into the bottom, nor what the character of the bottom is at those particular places, but I do know approximately the distance between the dolphins, and I do know that there is but a single line of boom sticks to keep the logs from passing outward between the dolphins; and I do not know that those dolphins appear to be less than forty feet apart, and possibly they are forty-five and fifty feet apart, whereas, the most of the logs will average thirty-two feet in length. That is to say, these logs are short enough so that they can move sideways outward through that boom between the piers, and that, as soon as any interior pressure, as made with a heavy freshet coming down, those logs will have a tendency to be pushed out through the side of the boom.

Q. What will result from that?

Ans. Well, the logs will escape from the boom and go down the

river, or else they will foul on the piers and swing broadside to the current, and take the maximum pressure.

200 Q. On which side of the river is the swiftest current at the location of these booms?

Ans. On the right hand side of the river coming down.

Q. That is the side the defendant's boom is on?

A. The side the new boom is on. I don't know whether it is the defendant's boom or not—there is a new boom there, and that is it.

Q. Well, what would be the result if the defendant's boom filled with logs, or even partially filled with logs, and if by reason of its lack of strength would go out, what would be the effect on the Nicomen boom?

Mr. ABEL: We object for the same reason that the witness is not competent to answer, and as being a conclusion on the part of the witness.

(Objection overruled. Exception taken.)

A. Well, it would wreck a portion of the Nicomen boom, but how much of it it might wreck, is merely a conjecture. But it certainly would if the wreckage came down and would strike the sheer of the Nicomen boom, and press it ashore—that is, press it against the bank on account of the heavy mass that would come down against it.

COURT: That would depend on the quantity of logs escaping above?

WITNESS: No, your honor, but on the manner in which it came down. If the upper boom would stand until its strength was overreached, the entire mass would come in a body, and if that entire mass landed in a body on the rudder boom, the boom could

201 not stand it; that is, it would be pressed against the bank.

Q. If the entire mass came against your main boom, would the boom stand it?

Ans. No, I don't think it would. It would break the boom wherever it struck it.

Q. And if it broke the boom, what would be the result?

A. Well, the wreckage, and everything that was carried away would go on down the river.

Q. What about the logs in your boom, if there were any in there at the time?

Ans. They would escape, of course, from the breakage.

Q. Now, you may describe to the court the construction of your boom with respect to strength and durability.

COURT: I don't see how that affects the case. There is no accusation here against your boom.

Q. Do you know on which side of the river there, the water is the deeper?

Ans. Well, up in that part the deeper water is on the right hand side, coming down.

Q. Now, do you know anything about a sand bar, or gravel bar, in the river opposite or close to the mouth of Smith's slough?

Ans. Well, I know there is a shoal placed there about opposite

the mouth of Smith's slough on the left hand side of the river coming down.

Q. Now, describe that bar and all about it, if you can.

COURT: At the mouth of the river?

Mr. STRATTON: At the mouth of Smith's slough.

COURT: That is at the upper end of the defendant's boom?

Mr. STRATTON: Yes, near the upper end.

COURT: You may proceed.

202 Q. (Question repeated by stenographer.)

Q. Well, it consists merely of a shoal place in the river opposite—or on that side.

Q. Now, how far out from the left bank of the stream does that bar extend? Does it extend as far as the dolphin of the defendant boom company?

A. It extends nearly over to the dolphins, but not quite. It may extend that far, but I was not right against the dolphins, only right in view of it, and the shoal water extended out to there.

Q. Do you know whether that bar is there at low tide, or not?

Ans. No, I do not know, because I was there. That is, I was never up in that part of the river at low tide, in a good many years. There is more or less of a freshet in the river now, so that water is not low.

Q. Now, do you know the character of vessels that have navigated North river? If you do, you may state to the court your knowledge as to that.

Ans. Well, I know that I have a knowledge of North river being navigated by craft or boats from dinkeys up to ocean going vessels.

Q. What vessels do you know as having navigated North river—that is, ocean going vessels?

Ans. I have particular knowledge of the Reliance, and the steamer Willapa.

Q. What approximately, is the tonnage of those vessels?

A. Well, the steamer Reliance has a tonnage of about 400 registered tonnage, and the Willapa has a registered tonnage of about 200 I think.

Q. Those are ocean going vessels, I understand you to say?

A. Yes sir.

Q. Mr. McGowan, can you state anything else with refer-

203 ence to the issues in this case before the court?

A. Well, I think perhaps that is rather a broad question.

COURT: I think that form of the question cannot be permitted. If you have any question, Mr. Stratton, you may ask it.

Mr. STRATTON: I don't think I have any further questions.

Q. Well, now assuming that the extension of your boom is made, and the defendant's boom having been constructed, what is the effect going to be on the navigation of North river?

Mr. ABEL: We would make the same objection as before.

COURT: Objection will be overruled.

A. There would not be any navigation there.

Q. Why?

COURT: I think that seems to be a conceded fact, that with both

booms as proposed by both parties, the river would be obstructed so that the river could not be navigated successfully.

Mr. STRATTON: If that is a conceded fact we will not ask any further questions about it.

Q. What would be the effect on the navigation of the river by the construction of the defendant's boom?

Mr. ABEL: We make the same objection.

COURT: I understand the defendant's boom is constructed. Is that a fact?

Mr. STRATTON: I asked what the effect of that construction is on the navigability of the river.

204 COURT: The witness has just been describing the location and situation of the boom, and he can describe the conditions further if you think it is necessary for your case.

A. Well, it would prevent navigation of the stream—that is to say, it would prevent the greater capacity of the stream for navigation, for the reason that it occupies or keeps the deep water and also this shoal part of the river, to a certain extent, and it does not leave it open in the sense of navigation. It should be open, for the reason that the only outlet that is left to go through that boom with any character of vessel that could come up that stream, is a little passage that extends about 150 feet, and possibly less than that, from the lower point of their sheer to the upper dolphin or the beginning of their race-way. The lower point of their sheer extends farther out into the stream towards the right hand bank of the river than the upper dolphin of their race-way. It is made that way so that the logs and timber coming down will be turned far enough to the right hand bank of the river that it will surely come down through the race-way of the boom.

COURT: That is what it is there for, is it not?

WITNESS: Yes, it could not be there for any other purpose. That leaves a lateral passage of say 100 to 150 feet between the sheer and the race-way, and a boat going up on the right hand side——

Q. Just a moment. Take plaintiff's "G" and point out to the court as you go along.

COURT: I think I understand.

205 Q. You refer now to the gap between the letters "A" and "B," in ink, on plaintiff's exhibit "G"?

A. Yes sir. That is supposed to be the sheer. Boats navigating the stream must go up on the right hand side navigating the river, and they have to move laterally across towards this space here between the lower end of the sheer marked "A" and the upper end of the race-way, marked "B," and it is impossible to move laterally across the stream on the left hand side going up. It is a very small space anyway between the single pile at the upper end of the sheer and the bank, but the space there is of no value as a requirement for navigation, such as the river is capable of, because the space is so small that nothing but very small boats and dinkeys, or something like that, would be able to go through. That is, they would have to shift their oars in getting by.

Q. Considering the current of North river, and the freshets and tides, state whether or not it would be practicable to navigate the river through the gap between "A" and "B"?

A. No sir; I would not undertake it unless the river was at a pretty low stage of water, so that the current would not be too strong.

Q. What can you say respecting the use of McGowan's slough in the booming of saw logs, that is, the slough at the lower extremity of your boom?

Ans. Well, I know that the slough is designed, or originally intended to be used.

COURT: What has that to do with the case?

206 WITNESS: We claim that the McGowan slough is not designed for catching logs.

COURT: Taking that to be true, how does this testimony affect any issue in the case?

WITNESS: It shows that it is necessary to extend our boom. It is right along the same theory, that that is no part of our boom for catching logs. The part of the booming area in the slough is designed for the purpose of storing logs and not for catching logs. It is for putting them in storage after they come down. It is a place used to keep them in for any length of time.

Q. Do you know, as a matter of fact, that this slough can be successfully used, or that it has been successfully used for the catching of logs?

Mr. ABEL: We do not contend that the slough is used for catching logs.

A. I only knew of the possible use of the slough from the reports that the boom company made to us on finishing up the reports, the foreman making his report to us.

Mr. ABEL: We would object to that then on the same grounds as before.

(Objection sustained. Exception taken.)

Cross-examination.

By Mr. ABEL:

Q. Now, you say, that two ocean going vessels, the Reliance and the Willapa, went up North river?

Ans. Yes sir.

Q. When did the Willapa go out of commission.

207 A. I don't remember when.

Q. That was a good many years ago, was it not?

A. Yes sir.

Q. It must have been ten years?

Ans. It may have been.

Q. How many times did it go up the river?

A. A good many times.

Q. And where to?

Ans. To the North river cannery.

Q. Where is the North river cannery as compared with the lower end of the Nicomen boom?

Ans. Why the cannery and the lower end of the Nicomen boom are practically together.

Q. How about the Reliance. When did the Reliance go up there?

Ans. I don't know exactly when she went up there. But we began canning there——

Q. I don't care for your own business, but how long since she went up there?

Ans. Somewhere during the years—between 1897—between 1897 and 1892.

Q. And the Reliance also went up to the cannery?

A. Yes sir.

Q. And the Willapa?

Ans. Yes sir.

Q. And the disputed area is a mile or two above the cannery, on up the river is it not?

Ans. Well, about a mile, I should say.

Q. Have you ever known of any ocean going vessels going above the Nicomen boom, or above the cannery on North river?

Ans. Ocean going vessels?

Q. Yes.

Ans. None of them, perhaps not.

208 Q. And could not have done so?

Ans. No sir.

Q. But you wish the court to understand that the disputed area of the river is capable of navigation by ocean going vessels?

Ans. No, I didn't say anything that I know of, that I would wish the court to draw that inference.

Q. You don't wish the court to understand that the disputed area is capable of navigation by ocean going vessels?

A. I wish to say now, that the water is deeper up above the cannery than it is below.

Q. The water is very shallow below the cannery?

A. Yes, to a certain extent. That is, up to a certain point.

Q. In other words, there is a shoal near the point opposite the cannery?

Ans. No sir; that is not what I mean. Down at the mouth of Smith's Creek, just below Hawk's point. It is shallower there than it is up above.

Q. When, at high tide?

Ans. No, not at high tide.

Q. How far distant is Hawk's point from the disputed area?

Ans. Well I never measured it, but probably Hawk's Point is like two miles and a half below.

Q. Is it not true that these vessels in going to the cannery, that is, the Reliance and the Willapa, had to go there on high tide?

Ans. No sir; it is not. I went in on the Willapa when it was not more than half flood.

Q. Could you go in on low tide?

Ans. No sir; we could not go in on low tide.

Q. How frequently have you been at the disputed area?

A. Not very frequently.

Q. How many years since you were there last, that is, before you were up there yesterday?

209 Ans. Well, it has been about two years.

Q. Now, you stated that your manager told you, or that Dan Lynn told you that there might be from fifty to one hundred per cent. more logs coming down this year than there were last?

Ans. Yes sir.

Q. And it was based on that statement, that you say the company deemed it advisable to make an extension at this time?

Ans. Not on that statement, no.

Q. On what, then?

A. On the explanation that he made of that statement.

Q. Did he tell you that Mr. Hobi and Mr. Kleeb were the owners that were going to put in that increase?

A. No, I don't think he mentioned them in that connection at all.

A. Did he tell you who it was that was going to put in more logs.

Ans. He said the loggers, and the men operating on North river.

Q. Do you not know at this time or did you not know at that time, that there was not more than half a dozen persons who logged to any considerable extent on North river?

Ans. Well, I think there are quite a number more than that from the different marks and the names of the owners of the marks that have been filed with the Nicomen Boom Co.

Q. How many are there in all?

Ans. I could not say, but it seems to me as many as a dozen have filed their brands.

Q. Did you know at that time that Mr. Kleeb and Mr. Hobi, the incorporators of the defendant boom company, were the largest loggers on North river?

Ans. No, I did not. I never knew that Mr. Kleeb was a logger on North river, although I knew that Mr. Hobi was.

Q. During what time of the year do logs come down

210 North river?

Ans. They come down around, beginning about November, and some years the last of them are supposed to be down in March, and other years they may come down in April or May.

Q. It is dependent on how much water there is in April or May?

Ans. It also depends on whether there are any logs left to come down at that time.

Q. Then we are to understand that North river is only capable of floating logs above these booms during the freshet season?

Ans. I did not say that?

Q. Are we to understand that; is that the fact or not?

A. That is, that would depend on what you consider freshet season. Of course, there may be a small, medium or large freshet. I would consider that North river, from my experience, that it would be capable of bringing down logs after two days of moderately heavy rain. Of course, during dry season I know logs could not come down North river. They would not come over the falls.

Q. Would it depend in any degree on the location of the logs, as to how far up the river they were, as to when they would reach the boom?

Ans. Yes, if logs were gotten out and put into North river, well, say half a mile below where the falls are, or a mile below, they could come down on most any ordinary ebb tide.

Q. Are there falls in North river?

Ans. There are when the river is at a low stage.

Q. Where are those falls?

Ans. About five miles above the cannery on North river.

Q. Is it not a less distance than that?

Ans. It might be a little less distance than that. I never
211 measured the distance, but it is quite a long ways. I know that the falls are above the boom structures that are in the river.

Q. They are quite a good ways above the uppermost point of the disputed area are they not?

Ans. I don't know just how far.

Q. Have you ever been up there?

Ans. You mean up to the falls?

Q. Yes sir.

Ans. Yes, I have been up to the falls two or three times. The first time I was up there in September, I think that was in 1887, I think.

Q. Now, above those falls, the river is not capable of navigation except for row boats and saw logs.

Ans. I have never been above the falls.

Q. Do you know whether or not it is navigable?

A. Only from hearsay.

Q. Is there any town or townsite in the vicinity of this disputed area?

Ans. There are no cities or towns there that I know of.

Q. No villages even?

Ans. There are people living up there, I believe.

Q. Four or five families?

Ans. There must be that many.

Q. Have you any of them here as witnesses?

(Objected to. Question withdrawn.)

Q. How frequently do boats go up and down North river over this disputed area?

Ans. What character of boats do you mean?

Q. Any kind. I don't know how frequently they do go, but I understand from the loggers that I have seen that have been
212 operating in North river, that they must move up and down quite frequently.

Q. Then it is the loggers who use the stream?

A. Well, loggers and settlers.

Q. Have you any of the loggers and settlers here as witnesses?

Ans. I don't know. I have not looked over the list of witnesses.

Redirect examination.

By Mr. STRATTON:

Q. You say that the water below the cannery is shallower than it is above for some distance?

Ans. Yes sir.

Q. Is the water shallower below the cannery than it is along the disputed area on the right hand side of the stream?

Ans. Yes sir.

Q. Is the water as deep on the right hand side of the stream there or along by the defendant's boom, as it is below the cannery?

Ans. Well, it is deeper for that entire distance than it is below the cannery.

Q. Do you know whether or not there has been another boom in North river other than the Nicomen boom and that of the defendant's?

Ans. Well, no, I haven't any personal knowledge of it.

Q. As a matter of fact, you know there was a boom there, don't you?

Ans. Well, I know that I have talked with men that said there was a boom there. One or two men have told me that they had an interest in a boom there.

Q. Do you know where it was located with reference to the upper extremity of the defendant's boom?

A. The parties that I referred to said that they had an interest in what was called the "settlers' boom," and they informed me
213 that it was up above where this new boom is located.

COURT: Let me ask you how far up the river you went yesterday?

WITNESS: Just up above the upper end of the sheer of the new boom.

COURT: Did you go through the gap between the shore and the dolphins?

WITNESS: Yes sir, I did.

COURT: How did you go up there?

WITNESS: In a little boat.

COURT: In a row boat?

Ans. In a small scow. I suppose it might have been eighteen or twenty feet long, and may be seven feet wide; it might have drawn six or eight inches of water.

COURT: Was it a steam boat?

WITNESS: No, it was propelled by oars.

Recross-examination.

By Mr. ABEL:

Q. Did these parties tell you where this Settlers' boom was located? How far it was above the disputed area?

A. Yes, they told me about where it was.

Q. It was just above, was it not?

Ans. Yes sir, just above.

(Witness excused.)

DAN LYNN, recalled for further examination on the part of the plaintiff.

Direct examination.

By Mr. STRATTON:

214 Q. Now, Mr. Lynn, are you acquainted with the depth of water in North river in the vicinity of these booms?

A. Yes sir.

Q. Do you know whether there is a bar or not—there is a bar on the left hand side of North river opposite Smith's slough?

Ans. I do.

Q. Now, you may state to the court what that bar is, and how far it extends from the left bank to the center of the stream.

Ans. Why, it is a bar just below Smith's slough, or pretty near opposite. It extends from the left bank to pretty nearly the middle of the river. At the time I took particular notice of it it was right within about two feet of some dolphins that were driven there.

Q. Dolphins of the defendant's boom?

Ans. Yes, of the new boom; the boom they were driving.

Q. How deep is the water on that bar at low tide?

A. At the time I noticed it particularly there was no water, I helped get the boat over it.

Q. Now, explain to the court what you mean by that.

A. Why, we pulled it over by hand. Those that had shoes on stayed in the boat and put their weight on the oars, and that would lift the boat up and lighten it and get it over.

Q. Now, when was that?

Ans. In September. We were operating it then, and that time we were going to work.

Q. Why did you pull the boat over. Why didn't you get out into deep water, towards the right bank of the stream?

A. Why, there were piling on the right hand bank of the stream, and dolphins between us and the piling.

Q. Now, since the construction of the defendant's boom
215 what has been the effect on the navigation of the river, by reason of that construction? I have reference now to that bar.

Ans. Well, since the boom sticks have been strung along the dolphins, there is no way to get up only at high water, or when there is enough tide to float. There would have to be enough water to float whatever you was in over the bar. You could not get over the bar if the tide was—low water.

Q. Have you seen the boom since it was constructed?

A. Since it was finished?

Q. Since it was practically finished, yes sir.

A. Yes sir.

Q. Since the booms were strung along the dolphins?

A. Yes sir.

Q. You may describe that construction to the court.

COURT: There -as been so much testimony on that that I think it is unnecessary.

Q. Very well, you may explain the strength of that structure, and what is liable to occur when the logs come into the boom.

Ans. Well, the strength depends a great deal on the depth that the piling are driven into the bottom of the river, and the strength of the current.

COURT: I think it is needless to go over that, unless it is to show that the piles were not deep enough but what the pressure would take them away. This is a case before the court and not before a jury, and it is useless to go before the court with such a multitude of petty details.

Q. What would be the effect on the Nicomen boom if the defendant's boom would go out?

Ans. In what way?

Q. If it would be carried away?

Ans. You mean if the defendant's boom was full of logs?

216 Q. Yes, or partially full.

Ans. Why, the entire mass would come down in a body, probably seven or eight logs deep, and in my opinion it would carry everything away in front of it.

Q. Well, considering the structure of the defendant, and the number or mass of logs that may come down at any time in one freshet, is the defendant's structure a safe boom?

Mr. ABEL: We would object to that, as the witness has not shown himself qualified to answer.

COURT: It is a conclusion the court can draw as well as the witness, from the facts in evidence.

(Exception taken.)

Q. Are there any logs in North river above the defendant's structure at this time?

Ans. There are.

Q. Do you know whether they are jammed together or lying loose?

Ans. They are jammed.

Q. How will those logs come down—in a body or a mass? Or will they come straggling?

Ans. Why, in that distance, when a jam is broken, they don't have time to scatter out much along the river, and they will come down in a body, practically.

Q. Now, if logs start to come down at the proper stage of the tide, and in a freshet such as frequently occurs on North river, how many logs will run into the boom per hour?

A. That depends greatly on the size of the river.

Q. I am speaking of North river, and I will limit it to

217 the plaintiff's boom; I will ask you how many on one tide, in five or six hours, can run into the boom?

A. There could most any amount run in. I could not state how many. It could be millions of feet.

Q. Supposing there were twenty million feet, now how long would

t take for those logs to run into the boom on a freshet stage of the rater—or on such a freshet as might occur up there?

Mr. ABEL: That is objected to as not being a proper hypothetical uestion.

COURT: The court fails to see the purpose, but let the witness nswer.

A. They would run in in an hour.

Q. The twenty million feet?

Ans. Yes sir; if they were close to the boom—if they got to he boom they would run in in an hour. They travel at the rate, isually, in freshet streams, of about eight miles an hour.

Cross examination.

By Mr. ABEL:

Q. You say that there is a jam at this time on North river?

Ans. Yes sir.

Q. A Jam of logs?

Ans. Yes sir.

Q. Where is it located?

Ans. Just above the—well, it is on what is called the "falls."

Q. It is at the falls?

Ans. Above the falls a little ways.

Q. And you wish the court to understand that that jam might ome down in a solid mass against the upper part of the defendnt's boom?

Ans. I don't wish the court to understand anything about my saying that. I said that if the jam was broken that the dis-
18 tance was so short between the boom and the jam that the logs would not have time to scatter out to any great extent.

Q. Is it not true that the alleged proposed extension of the plainiff boom company is above the uppermost part of the defendant's oom?

Ans. Yes sir.

Q. Would not the condition be worse in that respect, if that roposed extension was made, because it would be a shorter distance or those logs that are now in the jam to come down?

Mr. STRATTON: There is no testimony as to that at all, and we bject to it as not being proper cross-examination.

COURT: I don't think the plaintiff's boom is in controversy in this ase at all. It is taking up a good deal of time with something that s of no consequence.

Mr. ABEL: We note an exception and will pass that then.

Q. Who was with you when you pulled this boat over the Smith's ough riffle?

Ans. Jack Ogendale, Matt Barber and Theo. Ladi.

Q. What day was that?

Ans. I could not say.

Q. Was it in September?

Ans. Yes sir.

Q. It was before this suit was brought?
Ans. I think it was.
Q. Was it when you were taking the pile driver up the river?
Ans. No sir; the pile driver was there, and we were going up to go to work.
219 Q. Do you recall leaving the plaintiff's pile driver, this fish trap pile driver, up the river?
A. Leaving it?
Q. Yes, tying it there.
Ans. We frequently tied it there.
Q. Do you recall tying it after driving piling for this alleged extension—tying it yourself to the piling driven by the defendant company?
Ans. Tying the pile driver?
Q. Yes sir.
A. I do not recall it. I was not on the driver myself all the time.
Q. You did not tie it then?
Ans. No sir.

(Witness excused.)

THEO. LAHDI, being a witness called on the part of the plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By Mr. STRATTON:

Q. Mr. Lahdi, are you acquainted with North river in the vicinity of the defendant's boom, to any extent?
A. A little, yes sir.
Q. Have you ever gone up that river in a row boat?
A. Yes, quite a few times; I have gone up there lately.
Q. You may state to the court when you have gone up the river in that row boat.
Ans. Well, I went up there several times during the three months that I was there.
Q. During the month of September did you go up there?
A. Yes sir.
Q. What part of September—was it when Lynn and Maupin were there?
220 Ans. I could not tell you what part of September it was.
Q. On which side of the river did you go up, with respect to the dolphins that were driven for the boom; that is, which side of the river would it be coming down?
A. Well, going up we went up on the right hand side.
Q. How close to the dolphins of the defendant's boom did you go?
Ans. Well, we were not going to go very close, but we had to.
Q. How close?
Ans. Well, we had to go on a line between the two dolphins in order to get through.
Q. At what stage of the water were you there?

A. At low water.
Q. Now, how did you get up the river?
Ans. We pulled up.
Q. In a row boat?
Ans. Yes sir.
Q. When you came to that bar what did you do?
A. You mean in the place where we got stuck?
Q. Yes.
A. Well, we had to help the boat along; shoved it in closer to the boom.
Q. How much water was there there at the time on that bar?
Ans. I could not tell how much water there was there, because it was too muddy at the time. But the boat would not float.

COURT: Is it proposed to dispute that fact?
Mr. ABEL: It is admitted that Maupin, Williams and Ogendale will testify on that one particular point, the same as the last witness. That is, upon the navigability of the river near the mouth of Smith's slough.
221 COURT: I understand then that the stipulation relates to the time when they tried to go over this bar in a row boat in September last?
Mr. STRATTON: Yes sir.

Q. Now, how was the water with reference to depth on the side of the stream covered by the defendant's boom?
A. Why, I could not tell you, because I could not get in there.
Q. Was it blocked up?
Ans. Yes sir.
Q. Now, did you do any work on the extension of the plaintiff's boom on North river?
Ans. Yes sir.
Q. Now, you may state what you did, and when you did it. Just begin at the first day and go right through.
A. I was hired on the 6th of September and went over to the old boom on the afternoon of that day. When I got there the boiler on the pile driver was out of order, and they were tearing it to pieces. They had ordered a new one.
Q. Who do you mean by "they?"
A. Barber, Maupin, Williams, the fellows that were working there.
Q. Who were they working for?
Ans. The Nicomen Boom Co.
Q. What were they going to use the pile driver and engine for?
Ans. To drive the boom.
Q. To drive the boom for the Nicomen Boom Co.?
A. Yes sir.
Q. Where were they going to drive the boom?
A. You mean, where they were driving the boom?
Q. Yes.
Ans. Up the river.

...SE IN CENTER

222 Cross-examination.

By Mr. ABEL:

Q. Who employed you, Mr. Lahti?
Ans. Dan Lynn.
Q. Where were you when he employed you?
Ans. South Bend.
Q. He came here for you?
A. Why, he saw me on the street, yes sir.
Q. And you went over the same day?
A. That same afternoon, yes sir.
Q. Did he tell you that he was in a hurry about the matter?
A. Why, he was in a hurry to get me started; I think so.
Q. When you got over there, where were the piling which you were going to drive?
Ans. I did not observe that, to know.
Q. Did you help put piling into the river from the bank where they were piled?
Ans. That was later.
Q. Where were they located—were they on the bank?
A. They were a little ways up on the tide land.
Q. They were piled up there?
Ans. Yes sir; there were quite a few.
Q. They were fish trap piling, were they not?
A. Yes sir.
Q. Seemed quite small?
A. Yes sir.
Q. How large were they in diameter; were they as large as eight inches?
Ans. Some of them were that small, yes sir.
Q. You drove those?
A. No sir; didn't drive the smaller ones.
223 Q. How long were they?
Ans. Some of them were from twenty to forty feet.
Q. How many did you drive that were twenty feet long?
A. Well, I didn't measure them; it was none of my business.
Q. Twenty feet piling is very short piling, is it not?
A. Yes sir.
Q. You drove some of those?
A. (No answer.)
Q. When you went up the river you saw the North shore Boom & Driving Co. at work—the foreman was there working, was he not?
Ans. I don't remember seeing them.
Q. Were they driving piling up the river?
Ans. I don't remember seeing them.
Q. Did you see any piling up the river when you first went up with the pile driver?
Ans. Yes sir.
Q. Do you know John Jones?
Ans. No sir.
Q. Do you know the Boulsi boys?

Ans. No sir.

Q. You started to drive piling around in the vicinity of the piling which had already been driven, did you not?

A. Yes, above, I think.

Q. Did you hear Dan Lynn say at that time to the rest of other crew: "This looks like corking you up boys?"

A. I don't remember of his saying anything of that kind.

Q. Did you hear any conversation at all?

Ans. Not that I can remember, no sir. I can't remember that language.

Q. What language was used?

Ans. I can't remember whether they had any conversation at all or not.

Q. There may have been a conversation there with the other crew?

224 A. Which other crew?

Q. The crew of which Mr. Gray, the chairman of the board of commissioners here—you know him do you not?

A. No sir.

Q. You are a stranger here?

Ans. In South Bend I am, yes sir.

COURT: What is the materiality of all this, Mr. Abel?

Mr. ABEL: May it please the court, the court will see that we are casting a doubt upon whether or not their alleged intention was *bona fide* or not.

COURT: You are making a voluminous record here to no purpose. (Witness excused.)

G. OGENDALE, being called as a witness on the part of the plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By Mr. STRATTON:

Q. Where and on what day did you first commence to prepare to pile drive in North river for the purpose of driving an extension in the North river to the Nicomen boom?

Mr. ABEL: We make the same objection as to the materiality of this question.

Mr. STRATTON: Mr. Lahdi did not testify as to this.

COURT: Let him answer.

A. On the 4th day of September.

Q. What time of the day?

Ans. In the afternoon.

Q. Did you commence driving piles immediately after——

225 Mr. ABEL: We will object to that as being leading.

Q. When did you commence driving the piles?

A. I could not hardly tell you that. Of course, the old donkey

was to pieces, and we had to get a new one. We had to take time to fix it up.

Q. When did you send for the new boiler?

Ans. Right away after the old one was condemned.

Q. You sent right away on the 4th of September?

A. No, I think it was on the 5th.

Q. Did you afterwards commence driving pilings with the new boiler that was furnished?

Ans. As soon as we got it fixed and as soon as we got it ready.

Q. Where did you drive those pilings afterwards?

Mr. ABEL: We object to that.

COURT: Will that point be disputed?

Mr. STRATTON: If it is with the understanding that it is not disputed by the defendant, we will withdraw that question.

COURT: The court will stop the testimony on that line on the ground that it is cumulative.

Cross-examination.

By Mr. ABEL:

Q. On September 4th, when you were preparing the boiler, it was at the cannery, was it not?

Ans. Yes sir.

Q. And that is about a mile or two miles—that is between one and two miles below the new boom?

A. Yes, about a mile and a half.

Q. And the piling were located there?

Ans. They were about a mile and a half above the cannery.

226 COURT: I don't see any use in going over this matter.

Mr. ABEL: We would suggest that the plaintiff insists that they are in actual possession of this territory.

COURT: The date of the suit is a matter of record.

Mr. ABEL: I have no doubt but Mr. Stratton will state that they were in actual possession of that territory when they commenced work.

Redirect examination.

By Mr. STRATTON:

Q. When were you employed to go up there to do this work?

A. On the 3rd of September, 1903. I was asked on the 2nd and went over there on the 3rd.

(Witness excused.)

P. J. McGOWAN, being recalled on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. WELSH:

Q. Mr. McGowan, did you ever have a conversation with Mr. John M. Hobi, secretary and manager of the defendant boom company,

in which any reference was made to the extension of your boom; the Nicomen Boom Co.'s boom?

COURT: I think that same question was asked on the first examination.

Mr. WELSH: I had not finished the question.

COURT: Proceed.

(Mr. WELSH continuing:) And if so, state what you said to him, if anything.

227 A. I could not tell you exactly when we did have a talk.

Q. What month and what year was it?

Ans. It was in this year, 1903.

Q. Do you remember what month?

Ans. No, I do not.

Q. Was it before the month of August?

Ans. I could not say.

Q. Was it in the spring or was it last winter?

A. It was in the last of the summer. It was in the summer some time, I think. We were talking about some logs escaping from our boom, and we had some little controversy about it.

Q. I don't care about the controversy. I want to know if you at that time informed him that you would extend your boom?

Ans. Yes, I informed him that I intended to extend the boom, and also that I intended to put in some pockets to be more accommodating to the loggers, when I could get around to it.

Q. Was that before the incorporating of the defendant boom company?

Ans. Well, the defendant boom company was incorporated in September, was it?

Q. August 26th.

Ans. Well, then it was somewhere before that time.

Q. Was it before or after the incorporation of the defendant company?

Ans. My impression is that it was before.

Q. Was it before or after they commenced to drive piles in North river?

Ans. It was before they commenced to drive piles. It must have been some two months before. Perhaps it was some six weeks before, but I could not tell exactly.

228 Cross-examination.

By Mr. ABEL:

Q. Where was that conversation?

Ans. In South Bend.

Q. Where about?

Ans. Well, I could not tell you that.

Q. Was it at the Hotel Albee?

Ans. It might have been at the Albee, but I am not certain.

Q. J. J. Johnson and Albert Lynn were present at that conversation, were they not?

Ans. I don't remember of any other persons being present, only he and I.

Q. Did you in the presence of J. J. Johnson, Albert Lynn and J. F. Hobi, at South Bend, during the month of February, of this year, state to him that the Nicomen Boom Co. could not afford to pay for the logs lost from the boom during that season for the reason that you had a large boom and very few logs, and that the boom company was not making any money, and that you were going to provide better storage by extending the storage field up McGowan slough?

Mr. WELSH: That is objected to, because it is attempting to impeach a witness on immaterial matter.

COURT: Let the witness answer.

A. No such conversation occurred in those words; no sir.

Q. Do you know those men?

Ans. No sir; I talked with others. With Mr. Maupin, the man who lost most of those logs. I want it understood that that is absolutely untrue.

Q. Did you have a like conversation with Albert Lynn on the same day, going over to Nahcotta on the boat?

229 A. I don't remember of having any conversation. I don't remember of having met him on the boat. I may have met him, but I do not remember of having done so.

Redirect examination.

By Mr. STRATTON:

Q. Now, with reference to the first conversation, what if anything did you say?

COURT: He said he did not have any such conversation.

Q. Now, you may state what, if anything, you did say in the presence of Mr. Hobi, or others, at the time and place mentioned by Mr. Abel.

Ans. I have no recollection of those men being in the interview—except Mr. Hobi and myself. That is all that I have any recollection of being present on that occasion. And as to saying that we were making no money and could not pay for lost logs, is made out of whole cloth:—it is not true. The contrary to that is shown by my paying out nearly $1000 for lost logs.

Mr. ABEL: We move to strike that out.

COURT: That part will be stricken.

(Witness excused.)

J. J. SCHOOLER called on the part of the plaintiff, after being first duly sworn testified as follows:

Direct examination.

By Mr. STRATTON:

Q. Were you at any time part owner of the Steamer Flora Brown?

A. Yes sir.

230 Q. How much water did she draw?
Ans. About four feet.
Q. Do you know where the Settlers' Boom was located in North river?
A. Yes sir.
Q. You may state whether or not you ran on the Flora Brown as one of the managers of the boat.
Ans. Yes sir.
Q. Did that boat, Flora Brown, ever go up North river as far as the Settlers' Boom?
Ans. Yes sir.
Q. How far is the Settlers' Boom above the upper extremity of the Nicomen boom as heretofore operated?
A. I should judge two or three hundred feet from the mouth of it to the lower end of the Settlers' Boom,—from the mouth of the new boom to the lower end of the old boom.
Q. Where was the lower end of the Settlers' Boom with reference to the mouth of Smith's slough?
Ans. Well, it must have been six or seven hundred feet,—something like that. It may have been a little more—that is, to the mouth of the slough. Is that what you mean?
Q. Yes.
Ans. Yes, some six or seven hundred feet below the lower extremity of the Settlers' Boom. I would like to ask a question, as to whether or not the old boom that was torn out several years ago?
Q. Yes.
Ans. Yes, that is right then.
Q. Was there more than one settlers' boom there?
A. No sir.
Q. I will show to you plaintiff's Exhibit "G" and say to you that this slough is represented here by the words "Smith's Slough." Now, how far above Smith's slough have you gone with the Flora Brown?
231 Ans. I guess a half a mile or farther. I guess it is something in the neighborhood of that.
Q. Do you know of other steamboats going a half a mile or more in North river above Smith's slough?
A. No sir; I do not. That is I mean boats not any bigger than that boat. Smaller craft than the Flora Brown—gasolene launches, etc., do, yes sir.
Q. How far up have you seen them?
Ans. Oh, I suppose a mile probably, something like that.
A. Now, how much did these gasolene launches draw, that you have seen going a mile above Smith's slough?
A. I suppose a couple of feet.
Q. What were the launches, if you remember their names?
A. Well, I have seen the Union and other small boats running around in the bay here.
Q. They drew how much water?
COURT: He has already answered two feet.

Cross-examination.

By Mr. ABEL:

Q. When were you last up North river, Mr. Schooler?
A. About a week ago, I guess.
Q. What boat were you on then?
A. In my small boat,—a dinkey.
Q. Could the Flora Brown go up at low tide?
Ans. No, sir; not up to the Settlers' boom.
Q. Now, as I understand you to say, the Settlers' boom is just above the upper extremity of the new boom?
A. Yes sir.
Q. About two hundred feet?
Ans. About two or three hundred feet.
Q. And the Flora Brown could not go up at low tide; could not go up that far?
232 Ans. No, sir. It could go to the lower end of the new boom, I suppose, if it was not too low. If it was out on a real low tide it could not.
Q. There are other ripples just above the new boom, are there not?
Ans. Yes, sir.

Mr. STRATTON: We would object to that, and move to strike the answer.

COURT: Let the answer stand.

Q. Do those ripples prevent the gasolene launches from going up?
Ans. Yes, sir.
Q. In fact, that part of the river is only navigable when the tide is not low?

Mr. STRATTON: That is objected to. It is a question of whether it is navigable and I think the court can see.

COURT: Let him state the depth of water above the boom at low tide.

A. Well, taking it in the summer time, you can't get over in a small boat. There is practically no water there at all.
Q. Logs cannot run in the summer time at all in that part of the river, can they?
Ans. Not at low tide.
Q. Can ocean going vessels go up there, Mr. Schooler?
A. I don't think so.

Redirect examination.

By Mr. STRATTON:

Q. Well, at half or full tide, the Flora Brown in the summer time could run up above the upper extremity of the defendant's new boom, could it not?

Mr. ABEL: That is objected to as being leading.
233 COURT: Let him answer.

A. Well, at real high tide, we used to go up there occasionally by letting the boat go slowly. Of course, I was acquainted with the

river. I had been there seven or eight years, and had worked on the boom two or three seasons and knew it pretty well.

Q. You say that you worked on the boom up there? Is that the Settlers' boom that you refer to?

A. Yes, sir.

Q. Well, did not the steamers Cruiser and Edgar tow logs from that boom?

Ans. Yes, sir.

Q. Does not the Edgar draw much more water than the Flora Brown?

Mr. ABEL: That is objected to as being leading.

Mr. STRATTON: I will change the question.

Q. What depth of water did the Edgar draw?

A. About five and a half or six feet.

Q. How much did the Cruiser draw?

A. I don't think there was much difference in them.

Q. What was the character of the steamer Cruiser; what was it used for?

Ans. For towing logs at that time.

Q. What was it originally built for, if you know?

A. Why, for towing logs, and one thing and another.

Q. Do you know where it went to from South Bay?

A. To Coos Bay, I think.

Q. How did it go to Coos bay?

Ans. It went out on the ocean and down the coast.

Q. Went out on the ocean?

Ans. Yes, sir.

Q. Went over the bar here?

Ans. Yes, sir.

234 (Witness excused.)

A. P. LEONARD, being a witness called on the part of the plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By Mr. STRATTON:

Q. I will call your attention to a record boom marked "Deeds J," and direct your attention to page 23 thereof, and I will ask you what this is a record of. Or, first I will ask you what is your official position?

Mr. ABEL: We admit that Mr. Leonard is auditor of the county, and that the book is an official record.

Mr. STRATTON: This is as to the remonstrance as to the ownership——

COURT: Perhaps counsel will stipulate.

Mr. STRATTON: We will just offer in evidence the deed at page 23 of Deeds, Record "J" as to the passing of the deed.

Mr. ABEL: Will you furnish a copy of that? We make the objection that it is incompetent, irrelevant, and immaterial at any rate.

COURT: Let it go in.

Same is admitted and made plaintiff's Exhibit L.

Mr. STRATTON: We also offer in evidence deed commencing at page 160 of the same record.

COURT: What property do these records purport to have?

Mr. STRATTON: The property along the banks of the river.

235 COURT: From and to whom?

Mr. STRATTON: To Mr. McGowan, who was the owner. This is not the remonstrance. The deeds we are offering are conveyances to P. J. McGowan,—the conveyance is to the Nicomen Boom Co., and that is already in evidence. And the property described in those deeds and the property described in the deed to the Nicomen Boom Co. constitute the majority of the property along the river, that we claim gives us the right for the remonstrance to prevent them from putting in the boom.

COURT: That is, and the purpose is to show by this record that this was by the majority of the owners of the land along there.

Mr. ABEL: We would make the further objection that they do not connect these deeds with the original source of title.

Mr. STRATTON: We want to do that, if they are going to put us to that trouble.

COURT: You may proceed.

Mr. STRATTON: We will submit certified copies.

COURT: The court will allow you to file any certified deeds during the trial that you want to.

Certified copy of deed filed in evidence and marked plaintiff's Exhibit "M."

(It is admitted that the signature to the paper offered the witness is that of Mr. McGowan's.)

Mr. ABEL: We would object to the admission of this remonstrance in evidence.

(Objection overruled, and same is read in evidence.)

236 Q. Mr. Leonard, you are county auditor and clerk of the county board of commissioners in this county, are you not?

Ans. Yes, sir.

Q. When, if ever, was that remonstrance filed?

A. On the 10th day of August, at 10 minutes past two o'clock.

Q. Is it now on file with the board of county commissioners of this county?

Ans. Yes, sir.

Mr. WELSH: We offer the remonstrance in evidence, and ask leave to substitute certified copy.

COURT: Very well, you may do so.

Q. You made a note of it when it was filed?

A. Yes, sir.

Q. You may examine the records and I will recall you on that point.

(It is admitted that the remonstrance was filed on September 10th.)

Remonstrance admitted in evidence and marked plaintiff's Exhibit "N."

Plaintiff rests.

Defendant's Case.

Mr. ABEL: The defendant now moves to dismiss the action for the reason that the plaintiff has wholly failed to show cause, and has failed to show any injury to any rights that may have, or that the defendant was without right in doing what the evidence so far shows it has done.

237 COURT: The court will reserve its ruling.

Mr. WELSH: The plaintiff now objects to any evidence being offered on the part of the defendant, this being an equity case, and having moved the court for a dismissal of the action and judgment at the close of the plaintiff's testimony, we claim that the same is a demur to the evidence, and we claim that the defendant is now estopped from adducing any evidence.

COURT: The motion will be denied and you may take your exceptions.

(Exception taken.)

W. R. GRAY, being a witness on the part of the defendant, after being first duly sworn, testified as follows:-

Direct examination.

By Mr. ABEL:

Q. State your name.
Ans. W. R. Gray.
Q. Where do you live?
Ans. I live in this county.
Q. How long have you lived here?
Ans. About twelve years.
Q. What if any official position do you occupy?
A. I am chairman of the board of county commissioners.
Q. What is your business?
Ans. I am a contractor.
Q. As such contractor have you ever driven any booms?
A. Yes, sir.
Q. Have you driven piling?
Ans. Yes, sir.
Q. What experience in that line have you had?
A. I have had about twelve years experience.

238 Q. Did you do the work on the North Shore Boom & Driving Co.'s boom?

A. I did; yes, sir.
Q. Now, state to the court just exactly what you have done in that respect.
Ans. That is—what do you mean? Going up there and driving?
Q. Yes, just detail the whole thing, and you may commence at the beginning.

Mr. STRATTON: We would object to the witness detailing anything that has been done since the commencement of this action. It has

been admitted that since the commencement of this action the defendant's boom has been completed.

COURT: It would seem to the court that it would be needless to take testimony on matters that are conceded to be facts in the case. The court does not think that there is any evidence that these piles are not properly driven in the bed of the river, and it is simply taking up time for no purpose.

Mr. ABEL: May it please the court, the plaintiff has had full swing for two days and a half, and we wish to have a fair presentation of our case here.

COURT: There is no testimony here that these piles were not driven properly, and the court will assume that there was no testimony to the contrary that these piles were properly driven.

Mr. ABEL: I will ask specific questions then.

Q. When were you employed by the defendant company to drive this boom?

Ans. You mean the first time?

239 Q. Yes.

Ans. In July.

Q. What day in July?

Ans. Well sir, I cannot recall, but it was along about harvest time. I can't fix the date.

Q. What was the contract?

Ans. It was a verbal contract.

Q. What were you to do on that contract?

A. Go up on North river.

Mr. WELSH: We would object to this as being incompetent, irrelevant and immaterial, because it was prior to the time the defendant was organized. The defendant company not having been organized or incorporated, until about the 26th of August. He might have been employed by some individual, but I do not think the corporation was in existence at that time.

COURT: He may answer and the court will consider it.

Q. Who employed you?

Ans. Mr. Kleeb.

Q. John W. Kleeb?

Ans. Yes sir.

Q. What were you to do under that contract?

Mr. WELSH: We make the same objection.

(Objection overruled. Exception taken.)

A. I was to go up on North river and drive a boom there.

Q. Where were you to drive it?

Ans. In North river.

Q. What did you do in pursuance to this contract?

Mr. WELSH: We make the same objection as being incompetent, irrelevant and immaterial.

COURT: It seems to be admitted that he drove a boom

240 there.

Q. I simply want to know the date you started to drive.

A. We went up there on the 3rd day of September, in the afternoon.

Q. And from what place?

Ans. From South Bend. We got up there on the 4th and went to driving the line piles for the boom.

Q. Prior to that had you taken any material here?

A. Yes sir; I didn't take any, but there was a raft of piling there.

Q. Where were these located when you went there on the 3rd of September?

Ans. In the slough, I believe—Smith's slough.

Q. Is that the slought that was referred to in the plaintiff's case?

Ans. Yes sir.

Q. How many piling were there there at that time?

A. I could not say. I did not count them, and I don't know how many there were. There was upwards of 250 or 300.

COURT: What difference does it make?

Mr. ABEL: Our view is this—that the rights of these parties are based or fixed by a prior actual occupancy,—an actual taking possession of the premises.

Q. Do you know the location of the Nicomen boom?

A. Yes sir.

Q. Do you know where its rudder is?

Ans. Yes sir.

Q. On September 3rd, of this year, when you went there, what if any piling or boom structure or rudder boom, or any appurtenances connected with a boom, if any, were above the Nicomen Boom Co.'s rudder boom?

Ans. Any obstructions, you mean?

241 Q. No; constructions.

Ans. No, not as I know of.

Q. State whether or not there was any.

A. There was none.

Q. What can you say as to there being any person in open occupancy of the premises?

Ans. There were none that I saw at that time.

Mr. WELSH: We move to strike o[ut] the question and answer as being a conclusion on the part of the ...ness.

COURT: Let him state whether or not he saw anybody around there.

A. I did not.

Q. Did you see any other piles up there?

A. I did not see any.

Q. I believe you stated that you commenced driving piling on the 4th of September?

Ans. Yes sir.

Q. State briefly how this work was done.

Ans. How do you mean—as to being done by contract, or how? What do you mean—in what way?

Q. Just indicate here what you did upon the river.

(Witness now shown defendant's identification "1.")

A. Why, we made an outline of the boom. I think we drove six or eight piles. I can't say just how many, for the outline of this boom, that were to be driven.

Q. You refer to the new boom?

Ans. Yes; the North Shore boom.

COURT: What does the green on the map indicate?

Mr. ABEL: The new boom company's area and the yellow indicates the old boom company's boom.

242 Q. Go ahead now.

Ans. Then we commenced here at the upper end, and drove, I think, ten or eleven piles, somewhere along there, and then I believe we moved down here furthr down, and drove some two or three dolphins opposite Smith's slough, or a little above there. That was on the 9th, and then we went up to get a float that was up the river.

Q. How far was it from the mouth of Smith's slough to the upper part of the boom you constructed?

Ans. I don't know; I suppose it is 2000 feet. Now, I guess it is not that far,—it is about 1500 feet, I guess, as near as I can tell. Then we went up the river to get this float on the 9th, and we came back, and there was another pile driver here driving across, right across from there, on the 9th.

Q. State whether or not that pile driver had been there before.

Ans. No sir, it had not been there before.

Q. Had there been no work done by the plaintiff company at that time?

Ans. No sir, not there.

Q. Had it at any part above this rudder boom?

A. Not as I saw. And we came down, and we were driving piles—

Q. Just a moment, where were they driving them?

A. At the head of the boom?

Q. Of the new boom?

Ans. Yes sir.

Q. Where were they driving them with reference to the location of the rudder boom of the new company?

A. Just across, or opposite where the rudder of the new company is. That would be on the right hand side of the river as you come down. I asked Dan Lynn what he was doing there, and he

243 said: "You know how it goes corking fish traps."

Q. What is meant in fish trap piling by "corking?"

A. I don't know whether the court knows anything about that or not.

COURT: If the witness knows he may state.

A. I don't know much about fish traps, only if you put a fish trap down, if some one else drives below you, you get the catch in the other trap below.

COURT: I don't see as it makes any difference as to what was said by those parties.

Mr. ABEL: It is as to showing the *res gestæ*.

Q. Is that all that was said?

Ans. That was all that was said.

Q. Now, I call your attention as to what has been said about a single pile near the left bank of the river coming down.

Ans. In this rudder, the upper pile?

A. Yes.

Ans. Well, sir, that pile was put there,—Mr. Hobi went away,—he went to Tacoma and I drove that pile there; drove those dolphins; I drove a bunch out there, but it was in the way and it was blowed out. It was where the boats are supposed to go through the rudder or sheer, and they blowed that out as it was not in the right place. And at this upper place we drove two or three dolphins.

Q. You now refer to the sheer of the upper boom?

A. The upper sheer; yes sir. You asked me what that one pile meant.

Q. Yes.

Ans. That one pile was driven there, as I supposed they would possibly drive some more piles, and I wanted to get it in there before the tide would rise on us, so as to go down stream with the
244 flood. And we drove that pile in there, and I didn't know just how Mr. Hobi wanted that finished there, so I——

Q. Let me ask you how near that was to the bank?

A. Well, when we drove that there, it was, I suppose, fifteen feet from the bank. That is, from the stage of the water as it was then.

Q. What was the stage of the water then?

Ans. It was very near low tide at that time.

Q. How deep was the water at low tide there?

A. Well, I should judge it was about ten feet. I didn't measure it, but we lost an anchor there, and we took a pike pole to find the anchor with, and judging from the pike pole, which was sixteen feet long, it must have been about ten feet deep there.

Q. State whether or not this was at the time you drove that single pile?

Ans. Yes sir, it was.

Q. I will ask you whether or not that crew drove that single pile, intending it to be a part of the boom.

A. No sir; Mr. Hobi said he was—or, said he is going to drive that out.

Mr. STRATTON: We move to strike the answer out.

COURT: The answer may be stricken.

Q. Is it of any value in the use of that boom?

(Objected to as calling for a conclusion of the witness.)

COURT: He may answer.

A. No sir; not now.

Q. State whether or not the driving of it there was intended
245 to be permanent or temporary?

A. Well, I drove it there of my own accord when Mr. Hobi was away. I don't know whether there was anything attached to that or not.

Q. Did they attach anything to that?

Ans. Not that I know of. They had a boom stick run up and down there once in a while, but I don't think they attached it to that. I don't know whether they did or not.

Q. How far down from the upper end of the new boom does the new boom extend?

Ans. From where do you say; to the new boom?

Q. I mean the distance from the upper end of the old boom to the lower end of the new boom?

Ans. I don't know how far it is. I never measured it.

Q. How long is the new boom?

A. I should judge the new boom is a mile long.

Q. Indicate upon the plat, defendant's identification "1," where the new boom ends, and where the lower boom ends.

A. I should suppose it is about in there somewhere; about that point. (Witness indicates letter "A" on plat.) Of course, I never measured it.

COURT: It is not complete down as far as the green line on the map?

WITNESS: No sir.

Q. How far, in your judgment, is it from the lower end of the new boom to the uppermost end of the Nicomen Boom Co.?

A. I can't tell; I never measured it.

COURT: Have you had that measured?

Mr. ABEL: I don't remember of any one giving the meas-
246 urement; just an opinion on the distance, I don't think there was any testimony as to a survey on that. If the witness thinks he can give an approximate idea on it he may do so.

A. I suppose it is fifteen hundred feet.

Q. Now, you have stated that you started by driving a line of piling up the river to mark out the new boom?

A. Yes sir, but that did not include the distance from where we marked out that you speak of before. It is where we finished up the new boom.

Q. Did you mark out more than this, further down the river, by driving single piling.

Ans. Yes sir, we did.

Q. State how much of the river you marked out, which you did not use in building the boom?

Ans. Well, sir, that is pretty hard to do. I never measured it. It would only be approximate, if I should give it.

Q. Well, that is what we want.

Ans. Probably nine hundred or a thousand feet. Somewhere along there.

Q. This mark consisted of what?

Ans. Piling.

Q. What size piles were used in the construction of the new boom?

Ans. They varied from fourteen to twenty-one inches.

Q. Now, about the number that were used?

COURT: I do not think that is important, at all. There is nothing here as to the validity of the construction.

Mr. HEWEN: But there is as to the good faith of the building of the two booms, and we think that they have driven insuffi-
247 cient piling, and that we have driven good piles. Then, we think it is relevant showing the good faith of the defendant company.

COURT: It seems to be conceded here that you have driven a boom there for the purpose of catching logs. That is the very fight in this case.

Mr. HEWEN: Under the issues as I understand it, is this: the court has reversed its decisions, and has permitted them to go ahead.

COURT: The complaint is that you have built a boom there to catch logs. I think the objection will have to be sustained. It is going into matters about which there is no controversy.

(Objection sustained. Exception taken.)

Q. Are you familiar with the North river above the upper works of the defendant boom company?

Ans. No sir; I am not.

Q. Prior to the bringing of this action what did the plaintiff do in the way of driving piling upon or into the disputed area?

Mr. WELSH: That is objected to as being too general.

COURT: The witness has gone over that ground, stating the condition of the river at the time he began to drive.

Mr. ABEL: Is it conceded by the plaintiff that it had nothing,——

COURT: It is not necessary to concede that—he has testified to it already.

248 Q. What can you say as to the manner of the work done by the plaintiff just prior to the bringing of this suit, as to driving piling in the disputed area?

A. What do you mean; subsequently or not?

Q. As to the character of the work?

Ans. Do you mean as to whether it is substantial or not?

Q. Yes, as to the character of the work?

A. It is substantial in my estimation.

Q. I am now referring to the work of the plaintiff, the Nicomen Boom Co.

COURT: I have been unable to see how the driving of piles by the plaintiff subsequent to this action could alter the right or the status of the parties concerned. The question of intention is reserved by the court for decision. I think it is consuming unnecessary time to go into what the plaintiff has done, the character of the work done since the suit was commenced. However, the witness may answer if he knows.

Q. Now, Mr. Gray, I desire to know from you the character of the work done by the Nicomen Boom Co., in the disputed area, in driving piling after you commenced work for the other company, and before this suit was brought.

A. Well, it was not substantial enough for a boom.

Q. What was the size of the piling used by the plaintiff?

A. Well, they were—I could not say the size, but they were what they call fish trap piling. That is what they started with.

Q. How large?

Ans. Probably eight inches at the butt; eight or nine inches.

Q. In diameter?

A. Yes sir.

249 Q. And how long?

Ans. I could not say how long.

Q. Do you know of any of those piling going out?

A. Yes sir; there was——

Q. Just state the circumstances?

Ans. I saw where they were driving alongside of the work of the new boom company that they had tied some boom sticks to the piling, and one in particular lying alongside. It was tied by a rope.

Q. How did it come to be pulled out?

Ans. I suppose probably the boom stick was tied to it.

Q. The boom stick floating pulled it out?

Ans. Yes, sir; well, I could not say—it was lying there tied to the boom stick.

Q. Do you know of any other?

Ans. No sir; there were some that were knocked out, I suppose.

Q. What is the size of piling ordinarily used for the construction of booms in this locality?

Ans. We generally use from fourteen to twenty-one inches.

Q. You mean in diameter?

A. Yes sir, at the butt end of the piling.

Q. Now, how about the length?

Ans. It depends upon where they are driven.

Q. What kind of timber is usually used?

Ans. Usually hemlock, some fir and some spruce; with the spruce preferred.

Q. In the construction of an ordinary boom, how many piling are used per mile?

Mr. WELSH: We would object to that.

COURT: It would seem that you are dragging this out con-

250 siderably, Mr. Abel. I do not regard this as important enough to take up the time of the court. The objection will be sustained.

(Exception taken.)

Q. What kind of a pile driver, and what weight of hammer is required to drive boom piling?

Ans. I believe the hammer on the pile driver I used was a 2800 pound hammer. I can't recall exactly the weight, but I think it was a 2800 pound hammer.

Q. Now, as to a fish trap driver, what is the usual weight of the hammer?

Ans. Well, I don't know the weight a fish trap pile driver hammer

is. I know the weight of the one over there is an 1800 pound hammer.

Q. What amount of boom sticks would be required for the new boom?

Mr. WELSH: That is objected to as being immaterial. We do not contend that we have our extension in. We were restrained, and we allege that we could not construct our boom by reason of the fact that the defendant constructed theirs.

COURT: The objection will be sustained and exception allowed. (Exception taken.)

Recess for lunch.

Afternoon Session as follows:

251 Cross-examination.

By Mr. WELSH:

Q. Mr. Kleeb employed you to drive those piles, I understand you to say?

Ans. Yes sir.

Q. What is the largest size pile that you can drive with that pile driver?

Ans. I can put in a twenty-two inch pile. The hammer inside measures twenty-one inches and a half, but the uprights are spread so that I can put in a twenty-two inch pile.

Q. You say that you drove hemlock, fir and spruce?

A. Not over there. That is what we generally drive.

Q. What did you drive over there?

Ans. Spruce; that is always preferred.

Q. Do you know what size piling may be driven with the pile driver of the Nicomen Boom Co.?

Ans. I think they can drive twenty or twenty-one inch. I think the hammer is that wide.

Q. As a matter of fact, don't you know that they can drive a twenty-one inch pile?

Ans. Oh, yes; that is a twenty-one inch driver.

Q. Now, Mr. Gray, in driving piling for a boom, don't you believe it would be better to drive piling say fourteen inches in diameter, and drive more of them together, than it would to drive one pile twenty or twenty-one inches in diameter?

Ans. No, I don't think so. You take five piles and put one in the center and two on each side and drive them apart, or spraddled out at the bottom a few feet from the center pile so that you could put four piles outside of the center pile, and then draw them together at the top, they don't break the current individually,
252 and each pile holds itself, but where you drive so many together it results in catching all the current, and they are not so good.

COURT: I do not think there is any question in this case as to the driving of the piles. I am not undertaking to say how piles

should be driven. The only relevancy at all in the matter of driving the piles in the alleged extension of your boom is as to whether you were proceeding in good faith,—if that is the question.

Q. If you originally started to drive the defendant's boom—or I will ask you who instructed you where to drive it?

Ans. Mr. Hobi.

Q. Why did you commence farther down the river at that time than you did when you finished?

Ans. He is going to extend his boom down that far, I believe with pockets. We drove those line piles, as I said, for a line, for a row of piling that we were going to drive. We had to have a line to go by.

Q. Well, was it the intention to use this line of piles in the boom construction?

Ans. Yes, with a line right through them.

COURT: You say the line piles were driven first, before the dolphins were constructed?

WITNESS: Yes sir.

COURT: You drove the line piles first?

WITNESS: Yes sir.

Q. Then you began down here close to the rudder boom of the plaintiff corporation?

Ans. No, it is not close. It is away up above the old house there. I never measured it, but I presume it is five or six hundred
253 feet.

Q. That is where you started?

Ans. The line piles.

Q. And that is where Mr. Hobi instructed you that he would use it for pockets?

Ans. Yes sir.

Q. Where did you begin putting in the row of piles—at the upper or lower end of the defendant's boom?

A. Now, I can't recall that. That has slipped my memory.

Q. But you do know that at the time they measured it you began to drive the defendant's boom within five or six hundred feet of the upper extremity of the plaintiff's lower boom?

Ans. Yes, approximately; they are now there.

Q. Well, have you driven the boom down that far, now?

A. No sir; not to the lower extremity.

Q. You stated that Mr. Hobi told you that he would use them for pockets in his boom?

Ans. Yes sir, storage pockets, I believe.

Q. Was that the first day that you drove this line of piles that he instructed you where to drive the boom?

A. Yes sir; he was right with me when we drove the line piles.

Q. And he told you that his boom would extend down that far—as far as you had driven that line pile?

Ans. Yes, sir.

Q. And since the commencement of this action you have only finished the boom, you think, about a thousand or fifteen hundred feet, approximately?

Ans. Approximately something like that. It being late in the year he would not do any more this year.

Q. How did you get your pile driver up North river?

254 A. You mean from here?

Q. Yes.

Ans. Why, the Edgar took *up* up the first time.

Q. How far up did the steamer Edgar take your pile driver?

A. I think we went up to Smith's slough. I think that is where we went.

Q. Did you take your pile driver any further up than Smith's slough?

Ans. We went up in a little boat when we went up for the float.

Q. How many feet of water does the steamer Edgar draw?

A. Six and a half or seven feet; somewhere along there.

Q. It is quite a large boat?

Ans. Yes sir; it is a large tow boat; it is as large as we have here.

Q. And it is capable of plying from here to San Francisco, is it not?

Ans. I don't know about that, as I am not very familiar with boats. I am not sure about that because I don't know.

Q. You do not pretend to be familiar with the depths of water in the booms that were driven?

Ans. No sir; I don't. I never measured the water there. I just noticed the water along there, and that is all.

Q. At the upper extremity of the defendant's boom, how close to the left bank of the river did you drive piling?

A. About fifteen feet. I think it was about low water, or about nip tide then. It was about low water. And as has been said before, we had an anchor fast there and I was trying to get it out, and we had a sixteen foot pike pole with which we were trying to find the anchor.

Q. Where did you lose the anchor?

Ans. Right on the line with that pile.

255 Q. And you think the pile was driven just about low water mark?

Ans. No, about fifteen feet of water—I mean ten feet of water and fifteen feet of width from there to the bank, as near as I can tell. I did not measure it.

Q. What was the method by which you intended to connect with the bank here? Either that—you would have to do that or else you would not catch the logs, would you?

A. I can show you on this map here. You see I was going to do that until we cinched them up.

Mr. ABEL: Just let the court see your explanation of that.

(WITNESS continuing): Now, in here (indicating) was the opening of the sheer. The lower sheer was about one hundred or one hundred and fifty feet.

COURT: Which sheer is this now?

WITNESS: It is the left hand sheer going down stream.

COURT: That is on the side that the plaintiff's boom is on?

WITNESS: Yes sir. And then I drove a pile up above that. This is where the rudder or sheer boom is put on.

COURT: Is this the extreme dolphin?

WITNESS: Yes sir, of the main boom. Then there is a sheer boom that laps over that, and then piles driven at the other bank for the boom to go against, if they ever want to go up there and go through with a big boat. Then up there, further up, we did not finish that. We drove one pile there and then went out of there.

256 COURT: What does this cluster mean here?

WITNESS: The cluster of piling to which the sheer is attached. Then we went away from there, and, of course, Mr. Hobi was away at the time, and I didn't know hardly how he was going to fix it there, and when he came back we went up there, and we came to the conclusion that we would put in the dolphins here (Indicating dolphin on map) and put a boom along there around there like that as it shows there, and leave an opening there of twenty, twenty-five or thirty feet—I don't know how much, because we had not gotten there yet. When we were getting ready to go up there we broke the engine.

Q. How were you going to catch the logs?

Ans. They came down this side here, and came against it on the side where they go through with the small boats.

Q. Now, suppose the logs come down here on the other side?

A. Well, I don't know how they run.

Q. Well, now, does the river from one bank to another, if the logs are coming down the river, if you don't have the space closed from there to there across there, and you are not attached to the left bank you are certainly not going to catch any logs?

Ans. He said he was not going to attach there; that he would go to the deep water as soon as we could get there. I mean in the center of the river near the left bank.

Q. How close to the left bank?

Ans. This pile here is about fifteen feet from the left hand bank.

257 Q. And that is what they intended to do?

Ans. Yes sir.

Q. Then they would take this out of here. Now, how are you going to catch logs unless you attach to the left bank?

A. I don't know; they could run a boom stick along the side of this pile here.

Q. They would have to attach it to the bank would they not?

Ans. I don't know——

Q. It would have to be attached to the bank here?

A. I don't know how the logs run there. If the logs sheered or did not come into that bank they would have to go on down.

Q. What would sheer them?

Ans. This would sheer them; if you let this boom stick run up there there would be only a small space there.

Q. How much?

Ans. I could not tell you, because I could not tell how much that would be.

Q. You don't know whether he intended to attach to the left bank or not?

Ans. No sir.

Q. If they did not attach to the left bank could you catch the logs?

Ans. Oh, yes, you would have the whole river above.

Q. There is a place for the logs to go through?

A. Yes, there is a hole there, but whether they would go through or not, I could not tell you. That is something that I do not know.

Q. When logs are coming down the river on a freshet, do they not as a rule fill the river from bank to bank?

A. They do sometimes.

Q. Do they not in the majority of times?

Ans. It is according to the freshet and according to the tide.

258 If they have a flood tide they do not come down as rapidly as they do in an ebb tide.

Q. Does not the freshet overcome the tide? That is, if it is a big freshet?

Ans. Of course, it checks the tide all right, but the tide checks the freshet some. The other day when we were up there it was running very rapidly. It was running out very rapidly there so that we could not get out with the driver, and before we got away we had to pull our driver out.

COURT: Did I understand that the sheer of the defendant company's boom has not yet been fully constructed?

WITNESS: No sir, it was not fully constructed. I was going to finish constructing it when I was up there, and we broke the bed of the engine and we could not complete it.

Q. You blew the pier out up there?

Ans. Mr. Hobi did.

Q. Do you know why?

Ans. It was in the wrong place; I drove it in the wrong place where it ought not to be driven.

Q. You said in your direct examination that one of the piling which the plaintiff had driven there pulled out. Now, do you know whether or not that was pulled, or whether Dan Lynn pulled it out?

Ans. I don't know. I know it was pulled out, but I don't know how it was pulled out, or who pulled it out.

Q. Could you locate on this map, defendant's identification "A," the dolphin or pier that Mr. Hobi blew out?

259 A. It was up here where it is indicated on this map. It is marked. I put a pier there, and he had it blew out because it was in the passage way there. (Witness marked "B" where pile was blown out.)

Q. You have seen this map before?

Ans. Yes sir; I think I have seen it.

Q. Do you know what these figures indicate?

Mr. ABEL: We would object to that as not being proper cross examination.

COURT: The objection will be overruled. He may answer.

Mr. ABEL: I will change the question.

Q. What time was the pier pulled out?
Ans. I cannot tell you that because I was not there.
Q. Was it after the commencement of this action, or not?
A. Yes sir; I believe it was.
Q. Subsequent to the commencement of this action, and subsequent to the time that the injunction or temporary restraining order was issued, you found piling in this slough did you not?
Ans. Yes sir.
COURT: You mean drove piling where?
WITNESS: In Smith's slough.

Mr. ABEL: We would make the objection that that is not proper cross examination. There is no claim here as to the area of Smith's slough.
Mr. WELSH: Very well.

(Witness excused.)

NOEL MCCLAIR, being a witness called on the part of the
260 defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. HEWEN:

Q. What is your name?
Ans. Noel McClair.
Q. Where do you reside?
Ans. On North river.
Q. How long have you resided there?
Ans. Three years.
Q. What is your present occupation?
Ans. Well, I did not do very much for some time. I got hurt and I could not do much in any kind of an occupation.
Q. What is your present occupation; what do you now follow?
Ans. I am firing the engine on a boat.
Q. State what, if any connection you have with the transportation of the mails in this county; the United States mail?
Ans. I carry mail from Canto post-office to South Bend.
Q. Where is Canto?
Ans. It is on North river.
Q. What course do you take to so transport the mails?
COURT: Where is that with reference to Smith's slough,—is it above or below?
WITNESS: The slough is below the post-office.
Q. Is Smith's slough below the post-office?
Ans. Yes sir.
Q. How far above Smith's slough is the post-ofice?
A. I should say it is close on to two miles.
Q. How often do you so carry the mails?
Ans. Once a week, sir.
Q. Do you travel this same route oftener than that on any other business?

Ans. Occasionally, whenever boats come down the same
261 time that I want to come down; once or twice and sometime three times a week to South Bend.

Q. In so traveling, do you or do you not pass the boom of the defendant?

Ans. I do, yes sir.

Q. Are you acquainted with its location?

Ans. You mean of the boom?

Q. Yes.

Ans. Yes sir, I have seen it a good many times in passing so often.

Q. On what boat do you usually make this trip?

A. I use my little steam launch.

Q. What is the name of your boat?

Ans. The Margueritta.

Q. Well, now state whether or not the boom of the defendant interferes with the navigation of the river up and down its course opposite the line of this boom.

Ans. It has not since I started to go up and down; there is no obstruction. Since they have driven their boom I have not come to any obstruction in making my route.

Q. Have you passed it at different stages of the tide?

A. At different times, but not to any extremes.

Q. State whether or not you have ever had any difficulty in passing up and down the river with your boat?

A. No, I have not.

Q. State whether or not the ripple at the mouth of Smith's slough has interfered with your travel?

A. There is no ripple at Smith's slough.

Q. Well, below there?

Ans. All the ripples are above Smith's slough.

Q. State whether or not the ripples in the river either above or below, are opposite the boom of the defendant.

262 Ans. They are above the boom.

Q. In passing out of the river, or in passing up the river, at the upper extremity of the defendant's boom, state whether or not there is anything that obstructs navigation at that place, or whether the space is left for the passage of vessels?

Ans. There is plenty of space for me, sir.

Q. Have you had any trouble in so passing?

A. No sir; I think it was on Monday I towed a scow fifteen feet by twenty-five feet long, and I had a rope on it that I should judge was about thirty feet long. I swung it around the gap in Smith's slough to tow up the scow to Smith's house, and I did not have any trouble.

Q. What course do you take at that particular point of the boom,—the upper extremity? Did you go close to the bank or between the dolphins and the main boom,—or what course do you usually take?

Ans. To turn you mean?

Q. To pass up and down.

Ans. I generally try to go close to the bank to make a good swing into the current. There is lots of room there.

Q. In reference to this map here, what course do you usually take at this point with reference to the main boom—to the sheer boom?

Ans. Well, here is the sheer as it shows here, and when I go up the river if I recollect, I go up on the right hand side.

Q. At what place?

Ans. When on the right side to go across on the left hand of the sheer, and then I go on the right again around the sheer.

Q. Is there ample room for passage between the sheer boom and the main boom of the defendant?

Ans. There is lots of room.

263 Cross-examination.

By Mr. STRATTON:

Q. You are a fireman, you say?

Ans. Yes sir.

Q. You do not pretend to be a navigator?

A. Not exactly a thoroughbred on the salt water but in fresh water I can handle the craft I have.

Q. How long have you been making that run, carrying the mail to Canto?

Ans. Two months now.

Q. And that is all the experience you have had on North river?

Ans. No sir, not all.

Q. How long have you lived on North river?

A. Three years now.

Q. What part of North river do you live on?

A. The upper part of the navigating part of it; pretty near the extreme for navigating.

Q. How far above Canto?

Ans. Below Canto about half a mile.

Q. Do you own the Margueritta?

Ans. Yes sir.

Q. Has Mr. Hobi a mortgage on it?

Ans. Yes sir.

Q. You say that boom does not obstruct navigation?

A. It does not obstruct me.

Q. You mean your boat?

Ans. No sir.

Q. How much does your boat draw?

Ans. Three and a half feet.

Q. You say you go up past the boom twice a week?

A. Once, twice and three times, sometimes.

Q. Have you ever been up past that boom at low tide?

264 A. Yes, to a certain extent.

Q. What do you mean by "extent"?

A. Well, there are a good many kinds of low tides. There is what you call below low water mark and above high water mark.

Q. Have you ever been past there on zero tide?

A. I have not passed—I have been past, but no further, I went down and tied the boat there.

Q. Did you pass the boom there going up the river or coming down?

Ans. Yes sir.

Q. Coming down?

Ans. Yes sir.

Q. That is to say, you started from above the boom at zero tide?

Ans. I started from my place in high water, and came down on the tide to the head of the boom.

Q. You mean the upper part of the boom?

Ans. Of course, the upper part is the head.

COURT: You passed between the sheer and the main boom?

WITNESS: I did, sir.

Q. Now you were above the head of the boom when you started. What was the stage of the tide when you started?

A. A little better than half tide, so I could get over the ripples. I wanted to get down on the tide.

Q. Was the tide flooding or on the ebb?

A. When it is half tide it is flooding,—nip.

Q. Now, at half tide was the tide flooding? That is what I mean.

Ans. It was going down.

Q. Now, at half tide you started from Canto?

A. Yes sir.

Q. And you came down to the head of the boom?

A. Yes sir.

265 Q. Now, where did you tie your boat at the head of the boom?

Ans. Right on the sheer.

Q. You didn't go any further down?

Ans. No sir; I didn't have any business further down.

Q. Have you ever passed Smith's slough—the mouth of Smith's since this boom of the defendant was put in; did you ever pass there at zero tide?

Ans. No.

COURT: What do you mean by zero tide?

Mr. STRATTON: I think zero tide is an ordinary low tide; not the lowest tide. I mean zero tide as used by the government.

Q. You have never passed there since that boom was there?

A. No sir.

Q. Then you don't know whether you could pass there or not?

Ans. Oh yes; but I never went at such a time.

Q. Did you ever go past there when it was zero tide?

A. I have with my small boat.

Q. With your skiff?

Ans. Yes sir.

Q. Now, where was your launch when you went with your skiff? That is, when you went up or down North river opposite the mouth of Smith's slough?

Ans. Once it was in South Bend for repair, getting some pipes put in.

Q. Then you don't know whether or not you could go past Smith's slough at zero tide with your launch, do you?

A. I could not say. I wasn't there at that stage of the water.

Q. Then you don't know whether this boom of the defendant obstructs navigation of the river opposite Smith's slough, or not, do you?

Ans. I haven't come to any stage yet where it obstructs it.

Q. Then you don't know whether this boom of the defendant's obstructs navigation in North river opposite Smith's slough,
266 by your boat, or not, do you?

Ans. No sir.

Q. Canto is a post-office, is it not; United States post-office?

Ans. Yes sir.

Q. Is there a regular communication for the United States mail up North river from South Bend to Canto?

A. Yes sir, once a week.

Q. Now, this river is practically the only means of communication between South Bend and the settlements along North river, including Canto, is it not?

Ans. Yes sir.

Q. And you say that vessels have plied between South Bend and Canto in freight—in carrying freight, passengers and mail?

Ans. They have to have a good high tide to do that.

Q. They do ply between South Bend and Canto?

A. Yes, they do, with bigger vessels than mine.

Q. Do you mean to say that a vessel that draws more than yours does has to wait for high tide before it can go up to the uppermost extremity of the defendant's boom?

A. No, you don't need to go that far, but there is enough water.

Q. They don't have to wait for high tide?

Ans. No sir; not altogether.

Q. Can they go up there at low tide?

Ans. I don't know; I can't tell you.

Q. As a matter of fact, you don't know much about the depth of water there?

Ans. I don't talk for anybody else; I got through with my little vessel.

Q. At the times you have attempted to make the trip?

A. At the times I have had any occasion, I have had to do any work for myself.

267 Q. Now, you say you have gone up and down North river, or that when you have gone up the river you have gone up between the dolphin and the main boom, or between the dolphin of the main boom of the defendant's and the lower dolphin of the sheer, have you?

Ans. What do you mean? Do you mean the boom?

Q. Yes.

Ans. Yes sir.

Q. Near the point marked on the map, defendant's identification "1"; that has been marked in pencil?

A. Yes sir.

Q. Now, what is the difference between the dolphins and that gap?
Ans. You mean from the sheer boom?
Q. I mean the gap; what is the width?
Ans. I should say 100 feet, and possibly more.
Q. You say that you towed a scow fifteen feet wide through that gap?
Ans. Yes sir.
Q. When was that?
Ans. Last Monday.
Q. What was the stage of the tide?
Ans. It was a fair tide.
Q. What do you mean—do you mean a high tide?
A. Yes, a fair tide; very nearly high tide.
Q. There wasn't any current there at that time?
A. Yes, there was a current, because the water generally runs pretty freely in the winter time.
Q. The current was coming down?
Ans. Of course.
Q. How many miles an hour would you say the current was running at that time?
Ans. The current I should say, was running about three miles an hour.
268 Q. That is not a very swift current is it?
A. I should say no, it is not very swift. There is a swifter current than three miles an hour.
Q. You say there is no ripple near Smith's slough; you don't know whether there is a bar there or not, do you?
A. There might be a bar or some obstruction of some kind, but there is no ripple there that I know of.
Q. You simply do not know if it is there?
A. I have been along there, and if it was there I would find it pretty quickly.
Q. You have never been up there at low tide?
A. No, I have never struck out at low tide; I didn't have any business there.
Q. Now, have you any arrangements with the North Shore Boom & Driving Co. or Mr. Kleeb, or Mr. Hobi, for carrying the mail in a small boat, not in your launch, but in a small boat from any point on their boom to Canto?
Ans. No, I am supposed to take the mail right direct from South Bend to Canto post-office.
Q. As a matter of fact, you don't do it with your own boat, do you?
Ans. I can take my small boat when I can't get over the ripples.
Q. Does not the North Shore Boom Co., or Mr. Kleeb pay you for taking the mail above the boom?
Ans. No sir.
Q. Have you made any arrangements with them that they should pay you?
Ans. No sir.

Q. You have had some arrangements made for compensation, have you not?

Ans. No sir.

COURT: What is the purpose of this?

269 Mr. STRATTON: To show the interest of the witness, and further to show that the boom obstructs navigation.

WITNESS: The government pays me to do that work.

Q. Now, when this boom of the defendant's is catching logs, or becomes full, will it not obstruct navigation for your steam launch?

Ans. Well, it depends upon whether they close the gap. If it gets too full there might be an obstruction.

Q. Suppose they should close this gap at the letter "B" here?

Ans. If they would close me out, it would be an obstruction.

Q. But when the boom is full of logs it will be closed, will it not?

Ans. If that should happen. If that should happen I would have to take another way,—walk, or get there the best way I could.

Q. Now, when the water is coming down in a freshet a person having a tow could not successfully pass through this gap of 100 feet, could they?

Ans. I guess they could.

Q. At any stage of the tide?

Ans. I guess they could.

Q. You "guess" they could at any stage of the tide. Do you think, if you had a scow load of freight in tow, and the water or tide was coming down, that you would be willing to risk taking this scow through that gap when the water was running very swiftly?

Ans. I do it; yes, sir.

Q. At any stage of the tide?

Ans. Yes, sir.

Q. But you could not do it if the boom was full of logs?

A. Of course not; if the gap is closed I could not do it. There is no county road to walk.

Q. Now, this gap right here at "B," is the only space

270 left for going through that boom is it not?

Q. You mean altogether?

Q. Yes.

Ans. Not exactly; a small boat can go through anywhere.

Q. Between the dolphin or pile, which I marked "C" with a lead pencil; between there and the bank?

Ans. Yes, sir.

Q. That is, by a small boat, you mean a row boat?

A. I can go through with my launch.

Q. You can't go at low tide with your launch?

A. I have not been there at low tide, but I have gone through all right.

COURT: Between the dolphin and the bank—have you gone through there with the launch?

WITNESS: Yes, sir.

Q. That was not at low tide though. Now, when logs are coming down the stream, is it necessary that the gap be closed, the gap marked letter "C"?

Ans. I don't know, sir; it is left to the man tending the boom.

Q. What would be the result if it was not closed with logs coming down the stream on a freshet?

A. I don't know, but I guess they would have a man there to attend to that.

Q. Would not the logs be apt to pass through and down the river?

Ans. They would if you did not have a man there to attend to it.

Q. Now, have you not at times been obliged to wait at the defendant's boom, at the upper extremity of it, until the gap was opened so that you could get through and go on?

271 A. No, sir.

Q. You have never been delayed with your mail?

A. No, sir.

Q. You have never been delayed with any of your trips at all?

Ans. No, sir.

Q. Do you know on which side of the river the deeper water is along the length of this defendant's boom?

A. Well, as far as that matter is concerned——

Q. Just answer my question. Do you know on which side of the river the deeper water is?

Ans. It is on the right and left bank—I will give you an answer if you want it.

Q. Is it not deeper on one side than the other?

A. There is good deep water on the right and left bank.

Q. Where is the deeper water at this point on Smith's slough?

Ans. It is on the left. That is, going up.

Q. Where is the deeper water, say at this point down here in lot 4?

Ans. In fact, the river is almost even.

Q. Just answer my question.

Ans. You will find water in the middle.

Q. Where is the deeper water—on the right or left bank at that place?

Ans. It is in the middle; it is about even in the middle.

Q. What do you mean by being even in the middle?

A. In the center of the river.

Q. You mean even all through?

Ans. It is just as deep on each side as in the middle. It is perfectly flat and even; it is the same depth.

Q. You mean the bottom is level?

Ans. Yes, almost; of course, there is a little slant on the edge of it.

272 Q. Of course, if you go right down the bank you would get mud and grass,—but I don't suppose that is the way you would do it.

(Witness excused.)

LEE WEST, being a witness called on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. ABEL:

Q. What is your name?
Ans. Lee West.
Q. Where do you reside?
Ans. South Bend, Wash.
Q. How long have you lived here?
Ans. About three years and four months.
Q. Have you ever been up on the lower part of North river?
Ans. Yes, sir.
Q. To what extent are you acquainted with that part of the river in dispute here?
Ans. Well, I worked on a pile driver there in constructing the new boom for the plaintiff.
Q. When did you go over there?
Ans. The last day of August of 1903.
Q. Just state to the court what you did, briefly.

COURT: What is the object of that?

Mr. ABEL: Our purpose is this, your honor, we propose to show by this witness, and by every person on the pile driver crew, that they went over about that day, and that when they got there that the river was entirely unoccupied above the rudder boom—the original boom.

273 COURT: He may state what he saw, but need not say anything as to the constructing of the boom. That is a conceded fact in the case, and you need not go on to prove that.

Q. You say you were sent over there on August 31st?
A. Yes, sir.
Q. First, you may tell what you saw when you got over there.
Ans. Well, when I went over there I was taken over by the boat Union, and I went to work on a building that was going to be used as a bunk house.
COURT: Where was that?
WITNESS: On North river.
Q. On what part of North river?
Ans. A short ways above the rudder boom of the old boom company. And either two or three days after I went over, a pile driver came there.
Q. What pile driver?
Ans. The pile driver that constructed the new boom.
Q. Now, I will ask you what was the condition of the river above the rudder of the old boom at that time?
A. Well, the river, so far as I saw it, was entirely clear of piling, with the exception of three or four trap piling that had been driven three or four years ago above the upper end, and above the upper end there were some old dolphins that had been used in the old boom before.

Q. Is that the old Settlers' boom that you refer to?
A. I don't know, sir.
Q. State whether or not there were any other persons around that part of the river above the rudder of the old boom?
Ans. Well, all the persons that I saw was Dan Lynn; I
274 think about four or five days afterward. I was talking about our going up the river, and he was talking about one thing and another—about driving piles, and I saw some other men, Mr. John Smith and a few more people who lived there.
Q. I will ask you whether or not those other persons were there on the pile driver,—whether they were working on the new boom with Mr. Gray?
Ans. Not the persons that I speak of.
Q. But the other persons, John Smith and the others?
A. Well, no, he was getting out piling for the driver I was working on.
Q. Do you recall the circumstances of the plaintiff coming upon the river?

COURT: Is it contended by the plaintiff in this case that prior to the commencement of this action they had put any structures in the river in connection with their boom; had actually put in anything?
Mr. ABEL: They have been contending that, your honor.
COURT: You are taking a good deal of time.
Mr. ABEL: May it please the court, we have a large number of persons who were working for the defendant company, when work was commenced by driving piling, and by each of those witnesses we offer to show that the river was free of any obstruction or structure of any kind, or of any occupancy by the plaintiff company of September 4th, when we commenced driving piling.
275 COURT: Probably they will admit that your witnesses will so testify.
(Parties, both plaintiff and defendant, endeavor to arrive at a stipulation as to the testimony of these witnesses, but are unable to do so.)

Q. Now, the question is, do you recall the circumstances of the plaintiff taking a pile driver above this boom, the old boom of the Nicomen Boom Co.?
A. Yes, sir, I was at work there when they brought the pile driver up the river.
Q. On what day did they bring the pile driver up the river?
A. I am not sure, but I think it was on the 9th of September.
Q. Where did they bring it from on that day?

COURT: That makes no difference.
Mr. ABEL: We desire to show that it was not on the disputed area at that time.
COURT: It makes no difference if it was there.

Q. State whether or not you heard any conversation or any remarks by Dan Lynn, the Nicomen Boom Co.'s manager, when they commenced to drive piling, and what those remarks were.
Ans. I believe I did; yes, sir.

Q. State briefly what they were.
Ans. I believe I heard Mr. Lynn make the remark: "You know how we cork fish traps."
Q. Who was he speaking to?
Ans. I could not tell you.
Q. In fish trap parlance what is meant by "corking?"

(Objected to as being incompetent and irrelevant. Objection sustained.)

276 Mr. ABEL: Will that apply to the testimony of the other witnesses on that point, John Jones and Chas. Mussen, and the others?
COURT: Yes, it may apply.

(Witness excused.)

JOHN WOOLSEY, being a witness called on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. HEWEN:

Q. What is your name?
Ans. John Woolsey.
Q. I will ask you where you were on about September 4th, 1903?
Ans. I was working for the old Simpson Mill Co. at that time.
Q. What did you do next?
Ans. Well, sir, on September 6th I heard that Mr. Hobi had sent for me to go to North river to work on a pile driver, and I went down on the 7th, on Monday.
Q. What did you find to be the situation on North river at that time; who was engaged in work there, if any one?
A. Why, Mr. Gray, with his crew were the only men on the river at that time.
Q. State whether or not the plaintiff company, the Nicomen Boom Co., was engaged in any boom construction above its original rudder boom?
Ans. No sir; not at that time.
Q. When did they, if you know, commence any construction of that nature?
Ans. Along on the 9th.
Q. Of what month?
Ans. September, of this year.

(No cross examination.) (Witness excused.)

277 JERRY WOOLSEY, being a witness called on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. HEWEN:

Q. Mr. Woolsey, where were you employed in the early part of September, 1903?

A. Silers Mill Co.

Q. State whether or not you were engaged for any work on North river during that month?

Ans. Why, I hired to Mr. Hobi on Sunday, the 6th, and went to North river on the 7th of September.

Q. What did you find in regard to the condition on North river above the rudder boom of the Nicomen Boom Co. at that time?

Ans. Is that the old boom?

Q. Yes, above the old boom.

Ans. Nothing, further than a line of piling by which the new boom company had laid out their new boom.

Q. Who was engaged in driving piling at that time?

A. Why, Mr. Gray, was driving piling at that time.

Q. State whether or not the plaintiff, the Nicomen Boom Co. was then driving piling, or in any ways occupying North river with the area of the piling being driven by Mr. Gray?

Ans. They were not driving piling when I went there on the 7th.

Q. When did the plaintiff commence driving piling?

A. On the 9th, I believe.

Q. What month and year?

Ans. September, 1903.

Cross-examination.

COURT: I think that is enough testimony on that proposition.

278 Mr. ABEL: Well, they would not admit that fact.

COURT: This is the last witness that I will hear on that subject.

E. W. MUSSEN, being a witness, called on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. HEWEN:

Q. What is your name?

Ans. E. W. Mussen.

Q. Where were you employed during the early part of the month of September, 1903?

Ans. I was employed with Mr. Gray.

Q. Where?

Ans. On North river.

Q. What were you doing?

Ans. Driving piles.

Q. For whom?

Ans. Mr. Gray, I suppose. I suppose he is the man that I was working for.

Q. When did you commence driving piling?

Ans. On the 4th.

Q. When did you first go over there?

Ans. On the 3rd day of September, 1903.

Q. On the 3rd or 4th day of September, 1903, was there any other persons than the ones with whom you were employed engaged in driving piling or making any structure, or in any ways occupying the shore lines or waters of North river where the defendant's boom has since been constructed?

A. There was not.

279 Q. Did you observe the whole course of that work?

A. I did, sir.

Q. When did any other parties commence work there?

A. On the 9th day of September.

Q. Were you continuously employed from the time you went over there until after the 9th day of September?

A. I was.

Q. Had any other persons been occupying or driving any structures in those waters, would or would you not have observed them?

Ans. I certainly would.

Q. Are you acquainted with the location and conditions of the sheer boom of the defendant company?

A. Well, I am somewhat acquainted with the sheer boom of that company, yes sir.

Q. I am speaking now of the defendant.

Ans. Yes sir.

Q. State whether or not any piling driven by the defendant company is on land uncovered at ordinary low tide.

A. Does this take in both banks of the river?

Q. Of the sheer boom.

Ans. It does not.

Q. The piling nearest to the bank on the right hand side of the river going up—the piling of that sheer boom, is it or is it not exposed at mean low tide; that is where it enters the ground, is it exposed?

Ans. It is not exposed.

Q. Have you been engaged in working in this work spoken of about that piling, in that sheer boom?

Ans. Yes sir, I have.

Q. Have you had an opportunity to observe the depth and width of water at that place?

A. Yes sir.

Q. What is the distance from the bank on the right hand

280 side of *of* that pile which is nearest to the right hand side of the bank of the river?

Ans. What do you mean, the distance between the pile and the bank.

Q. Yes.

Ans. Somewhere in the neighborhood of fifteen feet.

Q. About what is the depth of the water at that point where the pile is nearest the bank at ordinary low tide?

A. You mean where the pile is driven?

Q. Yes.

Ans. About ten feet.

Q. Well, how does the depth change as it approaches the bank?

Ans. The bank usually slopes, but it is not much of a slope there. It is pretty near perpendicular there; that is, the bank is pretty nearly perpendicular.

Q. How far from the ordinary line of high tide is it to the line of ordinary low tide on that bank; that is, what would be the width of the tide line, approximately?

A. I never observed it very much, but do not think that there is much over two feet of tide land there.

Cross-examination.

By Mr. WELSH:

Q. Did you ever make any actual measurement?

A. Pretty near actual measurement?

Q. How?

Ans. From a scow with a pike pole.

Q. You never measured it with a tape line or a chain to take the exact measurement?

Ans. Oh no, not in that way.

Q. What do you mean by tide land?

Ans. As near as I can understand, and what I know of tide lands, is the land extending from the top of the bank down to the extreme low water edge. That it what I call tide land.

281 Q. How long has it been since you saw this boom?

A. I think it is four or five days.

Q. Has it not been longer than that?

Ans. I think it was last Saturday. I think that was when I saw it last.

Q. Can they catch logs there without attaching that boom to the left bank of the river?

Ans. Well, sir, I really think they can. At the same time, I am not positive as to whether they can or not, but I think they can; that is, without attaching it to the bank.

Q. If logs come down the river on a freshet, you think the logs will all go into the right bank of the river, and keep away from the left bank, because they have a boom there?

A. Well, I will tell you. Logs coming down to the bend in the river with a freshet on, will naturally be thrown across into that bank, and from that bank to the opposite side.

Q. Well, the bend in the river is to what bank, that being the case?

Ans. You see, they do not follow the bend in the bank—they strike the bend and sheer over.

Q. Can you explain to the court how they would sheer over from this left bank?

Ans. Well, the logs coming down here—you see, there is quite a little bend above this sheer, and logs coming down here they swing away above this sheer.

Q. I will ask you, from what you know of the river, if this plat is correct?

Ans. It is, with the exception of this bend just above the sheer. Logs striking this bank here have a tendency to shoot across the river.

Q. Don't you think, from looking at that river, that they
282 would come to the left bank?

A. They would strike on the McGowan side of the bank on this sheer, and strike across to the other side. That is, the majority of the logs do that.

Q. Suppose the river is full of logs?

Ans. Well, as a general thing you don't get the river full of logs. As a general thing they are scattering.

Q. Let me ask you what is an ordinary low tide?

A. I can't tell you any more than whenever the tide is out we call it low tide. Some days, of course, it would run out farther than others.

Q. In the summer time, when the tide is low, what is the depth there—with no freshet there, at the place we have been speaking about above the sheer boom?

A. I don't know what it is above the sheer boom.

Q. What is it at that piling at the uppermost extremity?

A. At the time I was there and measured it, it was about ten feet.

Q. When were you there?

Ans. In September, I think, when the boom was under construction.

Q. Do you know what the official government plat gives as the depth of the water there?

Ans. I do not.

Redirect examination.

By Mr. HEWEN:

Q. State whether or not the main boom of the defendant company and this sheer boom is sufficient for the navigation of boats.

COURT: Let him state the distance.

Mr. HEWEN: I will withdraw the question.

Q. State the distance, in your judgment, between the main
283 boom of the defendant company, at its upper extremity, and the sheer boom of the same company on the right hand side of the river,—what is the distance between them?

A. I think somewhere in the neighborhood of 100 feet, although I never measured it.

Q. State whether or not that gap is ordinarily closed or open?

Mr. WELSH: We will object to that.

COURT: The objection will be sustained. It depends on the conditions, of course.

Mr. ABEL: We would like to call attention to the testimony of Mr. Lynn, that he walked on the boom all the way up, and we expect to show by this and other witnesses that he could not have done that had it not been that the Nicomen Boom Co., that is, Mr. Lynn, himself, had strung boom sticks all the way along there.

Mr. STRATTON: Whether "ordinarily" closed or not—ordinarily closed would not throw any light on the statement that Mr. Abel has made to the court.

COURT: It would depend upon whether there was anything there to close it.

Mr. HEWEN: I want to show that it is ordinarily open.

COURT: You may let him state what there was to close it. The presumption is that it was open.

Q. State what there was there to close it, and whether it was in use.

284 Ans. There were boom sticks there to close it with.

Q. How much of the time were they used for that purpose, —for the purpose of closing it?

Ans. Up to the time they left there the gap had not been really closed; it was not fixed to close, it was not completed.

COURT: Why was it closed?

WITNESS: They had merely been working there, and it was while some of the party had gone to dinner that were working there—just left that hanging there.

Q. Who were those parties?

Ans. The Geer boys.

(Witness excused.)

NELSON GEER, called as a witness on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. ABEL:

Q. What is your name?

Ans. Nelson Geer.

Q. You are one of the Geer boys just referred to by the last witness?

Ans. I am.

Q. Did you hear his testimony respecting the gap between the sheer and the main boom of the new company?

Ans. I did.

Q. Now, you may state what you know about that gap during the past two months since the boom was commenced.

A. Well, during freshet time, that is, when a run was expected, they would go up and close it.

COURT: Who were you working for?

285 WITNESS: For the new boom Company.

Q. Go ahead with your explanation.

Ans. At time of freshet we would go up and close it with sticks, but we were right there ready to take them away when it quit. When we didn't expect logs to run we would take it away. I don't know how long it was there, but it was only there a few days.

Q. What was the purpose of putting them there?

A. So that the logs running off from the sheer would keep inside of the new boom; sheer them on into the boom. It was to keep them from going through this gap into the main river.

Q. What was your duty with respect to that gap?

A. I was there to watch it there and see that it was shut in time of heavy freshet with logs coming down.

Q. At all other times, state whether or not the gap would be open?

Ans. It was.

COURT: Do I understand that the defendant boom company's boom is at present time in operation catching logs as they come down?

Mr. ABEL: Yes, if any logs come down.

Cross-examination.

By Mr. WELSH:

Q. At the time you closed this were logs running in the stream?

Ans. No sir; it was just before freshet and we were expecting logs to come.

Q. Did you have the boom closed at the left bank of the river at that time, at the upper extremity of the boom?

A. No nothing merely a stick was attached to the sheer, to the end of it. It stuck out part ways across the gap, so that the

286 logs naturally would rub against the bank and would catch and throw them on down into the boom.

Q. This is at the upper extremity of the boom?

A. Yes sir.

Q. At the left bank did you have a boom stick?

A. Part way. Just the end was attached on this, and the end stuck out by this piling.

Q. And laid on the bank?

Ans. No, it didn't lay on the bank.

Q. Where did it lay?

Ans. In the water.

Q. Up against the bank?

Ans. No sir.

Q. Was it so close to the bank that they could not go between it and the bank?

Ans. If they got started just right they might accidentally go through, but logs running down the river won't accidentally hunt a hole the size of a log to go through.

Q. Do they ever run along the banks of the river?

A. They do sometimes, but in the bend of this river—that map is not drawn there showing the bend in the river. The bend in the river was above the sheer. The map is made too straight. The river takes a complete circle there and runs up around, so that the logs coming down will hit the bank above the sheer and they naturally glance across into the middle of the river.

(Witness excused.)

DAN GEER, being called as a witness on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. ABEL:

287 Q. What is your name?
Ans. Dan Geer.
Q. I will ask you if you are at this time in the employ of the new boom company?
Ans. Yes sir.
Q. Have you ever worked upon or ever had anything to do with the upper part of the new boom?
Ans. I certainly have.
Q. Just tell all that you have done.
A. Well——
COURT: That is a pretty general question. Limit it to the issues in controversy here.
Q. Well, with respect to the gap?
Ans. Well, the gap is planned to be, and is at the present time so that any boat that wants to can go up there.
Q. Will you explain to the court the position of that gap and its purpose, and whether or not it is an obstruction to navigation or not?
Ans. The gap is so as to admit steam boats at any time going up or down the river. It can be opened. It is not closed because the sticks have not been prepared with which to close the gap.
Q. Could you explain on a piece of paper the philosophy of the sheer boom?
Ans. Yes sir.
Q. Are you a practical boom man?
Ans. I have followed it quite a lot.
COURT: I think I understand the situation of that. I do not need any illustration.
Q. What was your duty with respect to that gap?
A. My duty was to look after it, and of course, I was there looking after the boom. It was my duty to see that it was all
288 right and in shape, and to keep it open if there were any boats. But at that time the head of the main boom had not been driven; it was not completed.
Q. Is the head of the main boom completed as yet?
A. It is at the present time.

Q. Now, are you familiar with the single pile that has been referred to in the testimony here?

Ans. Yes sir.

Q. Just tell the court how far that is from the bank at high tide and also at low tide.

Ans. I should judge at high tide that it is about twenty feet; that is, from the pile to the bank, and it is probably fifteen feet at ordinary low water.

Q. How high is the bank there?

Ans. I can't exactly tell. It is a fairly good bank.

Q. How much tidal action is there there?

A. The tide hardly comes over the bank there.

Q. Does it ever go over the bank?

A. It never goes over except on extreme high tide.

Q. That would go over the bank entirely?

A. Yes sir.

Q. Now, how deep is the water at low tide, near that boom, as driven?

Ans. I could not certify as to that, but it seemed to be deep enough; there seemed to be always plenty of water. I know boats go up and down.

COURT: Is that between the bank and the single pile?

WITNESS: Yes sir, the mail boat goes up and down there.

COURT: Since the main body of the boom has been completed, and the dolphins completed, is it necessary to keep a boom stick between the sheer boom and the main boom?

289 WITNESS: No sir; there is none there. The sticks that were there were only there temporarily. There was nothing fixed permanently there. There is never any need of it being there; there are never any logs there, only on a freshet. There is no need to have anything there.

Q. How long have you known that part of North river?

A. I worked there all the fall. I have been back and forth there, and worked there all fall.

Q. Have you been up and down the disputed area during low tide?

Ans. I have been there in all kinds of tides.

Q. Tell the court as to the situation at low tide in going along the length of the new boom.

Ans. There is plenty of water. I never saw it dry there at any time.

Q. Have you been up there in boats?

Ans. Yes sir, I have been up and down all of the boom there in boats.

Q. You say you are living there?

Ans. I have been there all the time on the boom.

Q. Now, with special reference to what has been called a shoal, a shallow place opposite Smith's slough?

A. Yes sir, I am acquainted with it.

Q. Now at low tide, what is the depth of the water there, and how wide is it between the dolphins there?

A. Well, sir, I have passed up and down there a good many times,

and I have always found plenty of water. Of course, I never measured it to find out how deep it was.

Q. What did you go up and down in?

Ans. Generally in a small boat, although I have seen the mail boat pass back and forth there.

290 Q. State whether or not there is any more difficulty in passing over the disputed area now at low tide than over the Nicomen boom, or that part of the river opposite the Nicomen boom.

(Objected to as being leading and calling for a conclusion of the witness.)

COURT: The mode of construction of the plaintiff's boom is not at issue in this case at all.

Q. Now how far distant are the dolphins of the new boom, if you know?

Ans. What do you mean?

Q. How far distant are they one from the other?

A. You mean from the main boom to the gap, or what do you mean?

Q. From dolphin to dolphin.

Ans. Probably forty feet long there, although I never measured it.

Q. Are they not the usual distance?

Ans. I think so, yes sir.

Q. How do they compare with the lower boom in that respect?

(Objected to as being immaterial.)

(Objection overruled. Exception taken.)

A. I think they are about the same, as near as I know. I never measured it.

Q. Is there any defect, or instability or insufficiency of the new boom with respect to the distance of the dolphins from one to the other?

Ans. I think not, no sir.

Q. Did you ever work for the plaintiff?

Ans. I have.

(No cross examination.)

(Witness excused.)

291 OLMA SMITH, being a witness, called on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. ABEL:

Q. What is your name?

A. Olma Smith.

Q. Where do you reside?

Ans. At present I am residing at South Bend.

Q. Did you ever live on North river?

Ans. Yes sir, I lived there all my life until about two years ago.

Q. Were you born there?

Ans. Yes sir.

Q. Are you familiar with North river; the lower part as to the depth of the river and the width, etc.?

A. Yes sir.

Q. Do you know the disputed area in this case?

A. Yes sir; I have been up and down there a good many times.

Q. Now, I wish you to state to the court if you ever owned a boat over there.

Ans. Well, I owned a launch for about three months. I sold it about two weeks ago.

Q. Who to?

Ans. To the Eagle Cash Grocery Co.

Q. Now, what is the situation and condition as respects the depth of the water and the navigability of the river on this disputed area?

Ans. Well, since I got that boat about three months ago I have been making numerous trips over there for one purpose and another, and I have passed the defendant's boom a number of times, sometimes I passed it at high tide and sometimes when the tide was quite well down, and I never had any trouble whatever.

202 Q. When were you last over there with your launch?

A. Why, a couple of weeks ago, as near as I can remember. It was just before I sold the boat.

Q. Have you been there at low tide since the new boom was built?

Ans. Not at extreme low tide.

Q. Have you been there at ordinary low tide?

A. I think so. I have not been there on tides that would be extreme low water at low tide, but I was there before the tide had run all out,—I think when I was there it was about average low tide.

Q. Now, what was the depth of the water on those occasions?

A. Well, I didn't measure it, but I went up and down there and I had plenty of water for my boat.

Q. How far did you go up above the new boom?

A. A couple of times I have been two or three miles above the new boom,—above the upper end of the new boom.

Q. Now, in passing through the gap, do you know what I refer to, at the upper end of the new boom?

Ans. I do; yes sir.

Q. Between the main boom and the sheer?

Ans. I do.

Q. Have you passed through there at any time?

A. I have.

Q. On what occasions?

Ans. Well, at these times when I went on up the river above the boom.

Q. Have you ever been there on such a tide when you have used that gap?

Ans. Well, there is one time that I recall now when the tide was the lowest, and I went on up above the boom a mile or so.

Q. How much water does your boat draw?

Ans. About three and a half feet.

Q. State whether or not you had any trouble or not?

293 A. No trouble at all—I had plenty of water.

Q. Do you know the location of this single pile referred to?

Ans. I do.

Q. Now just state whether or not you ever went between the bank and that pile?

Ans. Once or twice I went up the river, and there was some drift across this main gap,—or a boom stick, and I went through between this single pile and the bank.

COURT: Do you say you did that in a launch?

WITNESS: Yes sir, in a launch.

Q. At what stage of the tide?

Ans. I should judge it was about half tide.

Q. Now, are you familiar with the river in the vicinity of Smith's slough?

Ans. Well, yes, although I have never been along there at low tide since the new boom has been driven, but I have been up and down that shore many times before the boom was there.

Q. What, if any, difference was there in the water in the summer and winter in that lower part of North river?

A. Well, there is a difference that is caused from freshets.

Q. Well, just state generally the depth of the water in the summer time and also in winter time, and the like.

A. You mean at low tide?

Q. At low tide, etc.

Ans. I don't exactly understand what you want.

Q. Now, in the summer time what is the depth of the water over this part of the river that has been referred to in the evidence?

Ans. Well, at low tide I could not say exactly. I have never been there since the boom was driven.

294 Q. Well, before the boom was built?

Ans. Well, I should say at extreme low run out, there is three or four feet.

COURT: Three or four feet where?

WITNESS: Where the piers are, as near as I could judge, although I have not seen the piers since the boom was driven.

Q. Just state where the shoals and ripples are on North river.

Ans. Well, the shoal water in the new boom is somewhere in the neighborhood of that slough.

Q. You mean Smith's slough?

Ans. Yes, sir.

Q. And in the summer time what would be the depth of the water there? That is, at the various stages of the tide?

Ans. Well, at low tide I should judge there may be three or four feet; somewhere in there.

Q. How far is North river navigable; how far up the river have you ever been in a boat of any kind?

A. You mean with a launch?

Q. Yes, or with a row boat.

Ans. I have been to the end of tide water with a row boat.

Q. How far does tide water extend from the mouth of the river?

Ans. From the mouth of the river or the boom?

Q. From the mouth of the river.

Ans. Well, that is kind of hard to decide, because I don't know how far from the mouth of the river it is to the boom.

COURT: How far above the boom does tide water extend?

WITNESS: Four or five miles, I think.

Q. What do the falls consist of?

Ans. Well, there is a large lift or raise in the river about four or five feet, and it runs back a couple of hundred feet distance, and makes it impracticable for navigation.

295 COURT: That is about four or five miles above the boom of the defendant, is it not?

WITNESS: Yes, sir; that is, above the extreme head of tide water. Or, I should say, that that is the extreme head of tide water.

Q. Now, coming down the river, please state to the court what the depth of the water is at this time?

A. Well, to go to the head with a row boat you will have to go at high tide.

Q. Even at this time?

Ans. Yes, at any time; because there is only a couple of feet rise and fall in the water at the falls. And from there down to the upper end of the new boom at short intervals are ripples which are bare, or practically so, at low tide. It is just fresh water coming down the river.

Q. Go ahead.

Ans. So that when the tide is out there is no tide water a mile or a mile and a half above the boom. At low tide there is no tide water more than a mile above the upper end of the new boom.

Q. Were you familiar with the Settler's boom, so called?

A. Yes, sir; I lived on the river at the time, not more than a mile from this boom.

Q. Where was that located?

Ans. Three or four hundred feet above the upper end of this new boom.

Q. Did you ever work on that boom?

Ans. I have not, but I have been around considerably, looking at them and taking observations. I never worked on one.

296 Q. What can you say as to the width of the river and the height of the banks where the Settlers' boom is located?

A. Well, I never measured the river along there, but I should judge it is 175 or 200 feet in width.

Q. Now, as to the height of the bank?

COURT: Where was the Settlers' boom with reference to the upper end of the defendant's boom?

WITNESS: 300 or 400 feet above, and as to the banks, I don't know just how high they are. It takes an extreme high tide to go over them at all. Very few tides go over them.

Cross examination.

By Mr. WELSH:

Q. Are you acquainted with the bar in the river below or opposite Smith's slough; a shallow place in the river?

A. Well, yes, I have understood, to the best of my knowledge, that the shallowest water is right along there somewhere.

Q. Now, you do know, do you not, that this shallow place is on this side of the river on the left hand bank?

A. Yes, sir, the shallowest water is on that side.

Q. In fact, the shallowest water in the river is on the right bank, is it not?

Ans. Right along there it is, yes, sir.

Q. And vessels navigating there, must of necessity keep close to the right bank for that reason?

Ans. No.

Q. Is not the water, as given on the official map,—or I will ask you if you know anything about the government map?

Ans. No, I do not. I never noticed it.

297 Q. I will state for your information that it gives it as about twice as much on that side as on the left bank. Now, you say that you have observed vessels plying back and forth on North river?

Ans. I have, yes, sir.

Q. And you are acquainted with the steamer Cruiser and Edgar?

Ans. Yes, sir.

Q. You remember when the old Settlers' boom was in operation that those boats used to tow logs from South Bend to that boom?

Ans. I do.

Q. And did you not then observe, during those times, in the vicinity of the defendant's boom that those vessels would keep close to the right bank of that river?

A. Well, of course, when the whole river is open it is natural for a boat to take that side.

Q. Now, with the defendant's boom there full of logs, or partially full of logs, or if it is closed so that logs are coming down the river, must not a vessel then of necessity refrain entirely from going up and down that stream or else go up the left bank of the river?

Ans. Well, I told you that whenever a vessel can get over below, over the shallow waters below, that there is plenty of water up there.

Q. Where are the shallow waters?

Ans. At the cannery, and from the Nicomen boom across the river, or just above the mouth of Smith's Creek. Just above the mouth of Smith's Creek there is a bar clear across the river, and there is also a bar down below Hawk's Point, there is another bar there.

Q. How much water does the Cruiser draw?

Ans. I don't know only from what I have heard. She
298 draws six and a half feet.

Q. More than that does it not?

Ans. No, I don't think it is any more than that.

Q. She is a large steam vessel, is she not?

Ans. Yes, sir.

Q. Do you know what horse power she has; do you know the length of it?

Mr. ABEL: That is objected to as not being proper cross-examination.

Q. You are a boat builder?

Ans. Yes, sir; that is my business at present.

Q. You are quite well acquainted with the steamer Cruiser?

A. Well, no; I have been on the steamer a few times, but I never saw the boat out of the water; and I am no marine engineer, so I don't know the horse power.

Q. Will you swear the ordinary low tide from the point marked "C" on defendant's identification "1" to the place marked "D" that the water at ordinary low tide on the left bank of the river is no greater depth than from two to four and five feet?

Ans. Well, I would not swear to anything along there without measuring the water, since the boom has been driven.

Q. You never measured it?

Ans. Not with a measuring pole, no, sir.

Q. Will you swear from the points indicated that the water is not greater than as stated, two, four and five feet?

Ans. My former answer on that covers that.

Q. You would not swear that it was not of any greater depth?

Ans. Not without measuring it since the boom has been driven, and I have not been there since the boom has been driven,
299 that is, to be there at low water.

Q. You say that you have seen the Cruiser and Edgar towing rafts of logs from the old Settlers' boom?

A. I have.

Q. Would it be possible for a vessel to tow a raft of logs down through there with the defendant's boom in the river?

Ans. Why, I think that any raft that could pass on down the river past the other boom could be taken through there.

Q. You do?

Ans. I do, when the water is up, of course.

Q. That is your opinion, that between this upper pile that you have been testifying about, that a five foot vessel could go through there with a raft of logs, or could go through that gap?

Mr. ABEL: That is objected to as containing an assumption not based on facts.

COURT: Let him answer if he understands the question.

Q. (Question repeated by stenographer.)

A. It would be hard to get a raft of logs forty-five or fifty feet wide, but it would go through the gap in the middle of the river.

Q. Would it be hard for the vessel to turn and swing in toward that gap?

Ans. I think not. I think a vessel could make it all right.

Q. How wide is the river there?

Ans. Well, at that point it is wider than where the old Settlers' boom is, so it must be approximately 200 feet or very nearly.

Q. At that rate a vessel would have about 100 feet in
300 which to make a turn, would it? That is, if all the space is taken up with the boom?

Ans. Yes, I guess the outer end of the sheer is about in the middle of the stream.

Q. Now, don't you think, as a matter of fact, that the defendant's boom practically closes navigation on North river for steam vessels and other water craft?

Q. For how far above the boom?

Q. Well, as far as navigation goes?

Ans. Well, whenever a boat, a steam boat or launch can go a mile above the upper end of that boom she can very easily pass one side of that boom and have plenty of room.

Q. There are settlers along North river, are there not?

A. Yes, a few.

Q. People live up there in that vicinity?

A. Yes, sir.

Q. There is a post-office further up the river?

A. Yes sir, there is a post-office.

Q. Now, as a matter of fact, the only means of ingress and egress for those settlers along there is by North river, is it not?

Ans. The lower river is the only way.

Q. The only means of getting in and out of there is to go up North river by boats or other water craft?

A. Yes sir.

Redirect examination.

By Mr. ABEL:

Q. Have you ever had any experience in towing logs?

A. Very little, not handling boats myself.

Q. Have you worked on a boat engaged in towing logs?

A. No, I have not, but I have been on them a number of
301 times when they were towing.

Q. On what river?

Ans. On North river.

Q. Now, you speak of bars below the new boom?

A. Yes sir.

Q. At ordinary low tide what is the depth of water there at the bars you refer to below the new boom?

A. I never measured it accurately, but I have gone with a row boat up and down there, and have touched the bottom of the river with the oars, so there could not be more than three feet of water, and I have seen such boats as the Union hung up on the bar below Hawk's Point.

Q. Where is that point?

Ans. It is two or two and a half miles below the cannery. The cannery is just above the mouth of the river.

COURT: Did I understand you to say that there were shoals at the mouth of the river, preventing boats from getting in and out at low tide?

WITNESS: There are. I have seen boats hung up on them. They would not be able to start up until a new tide would come.

Q. You have testified to the existence of bars below the cannery. I will ask you whether or not at ordinary low tide vessels can pass up or down North river over those bars?

Ans. Well, at ordinary low tide a vessel of ordinary light draft can, but at extreme low tide they cannot.

Q. Now, what difference is there, if any, in the navigability of that part of North river in dispute, compared with the bars you have testified to a mile or two miles below the cannery?

Ans. Well, I think there is very little difference in com-
302 parison as to the depth of water on those bars at the boom and slough at the lower end of the Nicomen boom, at Hawk's Point or the Smith's Creek bar.

Q. Then you find the unobstructed part of the river opposite the new boom?

Ans. It is as navigable there as those parts of the river below the cannery.

Q. You think then that it is as navigable there as at these points you speak of below the cannery?

Ans. I think so.

(Witness excused.)

C. A. COLTER, called as a witness on the part of the defendant, after being first duly sworn, testified as follows:

Redirect examination.

By Mr. ABEL:

Q. What is your name?

Ans. C. A. Colter.

Q. Where do you reside?

A. South Bend.

Q. How long have you lived there?

Ans. Fourteen years.

Q. During that period have you been engaged in the steamboat business?

Ans. Yes sir.

Q. For how long?

Ans. Fourteen years.

Q. Are you acquainted with the depth of water, or the availibility for navigation of North river?

Ans. Generally speaking, yes sir.

303 Q. I wish you would tell the court to what extent North river can be navigated, under ordinary circumstances, especially that part of North river in dispute here.

A. Well, at ordinary low tide, and half tide, boats drawing six or seven feet of water can go through to the upper end of the boom.

Q. Which boom?

Ans. The new boom.

Q. Just state to the court what kind of a boat you used.

A. I have a tow boat sixty-one feet long and fifteen foot, nine inch beam. She draws five and a half feet of water.

Q. Is it the Laurel you refer to?

Ans. Yes sir.

Q. I wish you would state to the court whether you have been up North river since the new boom was built, with the Laurel.

COURT: What do you say is the draft of the Laurel?

WITNESS: Between five and a half and six feet; it depends upon the amount of fuel on board.

Q. When did you go up last?

Ans. I think the last time was about two weeks ago.

Q. How frequently have you been up since the new boom was commenced?

Ans. I have been up there three times, I think.

Q. Now, you may state under what conditions you went up the river with the Laurel on those occasions.

Ans. Well, I went up once to take Mr. Kleeb. He was wondering whether I could go through and around the boom, or not.

Q. How was the tide?

A. It was about half tide. Twice I went up there with tows of piling and once with the sheriff.

Q. What were the stages of the tide on those occasions?

A. Well, they were, with the exception of the last time,
304 about half tide; all three were about half tide.

Q. And the last time?

Ans. I don't know. I went up with the sheriff and I did not pay any attention to it.

Q. Now, the time you went up with Mr. Kleeb, just state where you went, and what if any difficulty you experienced in respect to taking your vessel.

A. We went up on the outside of the boom, and went around between the end of the boom and the sheer, and went through the opening that was left, I believe, for navigation.

Q. Do you know where the single pile is that has been referred to in the evidence?

Ans. Why, I don't know. I don't know whether there are one, two or three piling there. I simply know that we went between the end of the new boom and the shore. I didn't see any more piling.

Q. You went through there with a boat?

A. Yes sir.

Q. At what stage of the water?

Ans. About half tide.

Q. And how did you come down?

A. Went right through and turned around and came around through the opening.

COURT: The place between the main boom and the sheer boom of the defendant at the upper end?

WITNESS: Yes sir.

Q. Which way was the tide running then, was it ebbing or flowing?

Ans. I am not certain, but I think it was ebb tide.

Q. Did you experience any difficulty, and if so, what, in making the turn and going in through the gap made for navigation?

Ans. No sir; we didn't.

Q. Are there boats larger than yours which ply upon the waters of North river?

Ans. Why, I do not think so at the present time. The
305 Reliable goes up to the cannery I think.

Q. That is below this, is it not; a mile and a half or two miles below?

Ans. Yes sir.

Q. Now, I would like to have you give the court an idea of the times such a boat as yours has been called upon to go up North river, say during the last year. What I want to get at is the extent which North river is used by such boats.

Mr. STRATTON: I do not think the witness can answer that question. He may not have had occasion to go and others might have had.

COURT: The objection will be sustained.

Q. Do you know the extent to which boats such as yours and other craft have occasion to go up there?

Ans. You mean above the boom?

Q. Up North river, generally speaking.

Ans. Why, when there are logs in the boom, of course, they have occasion to go up there a good many times.

Q. Do they have occasion to go up for any other purpose?

A. Well, not often.

Q. Are there any booms above?

Ans. There are none above the North Shore Boom Co.'s boom that I know of.

Q. What other purpose would they have for going up there besides the purpose of towing logs?

Ans. That depends. They are likely to go up there for most anything. I have been up on picnics for amusement.

Q. At the time you took Mr. Kleeb up there, did you take any soundings?

Ans. Yes sir.

Q. What were those soundings?

Ans. Well, we sounded there by Smith's Slough, and going
306 through the gap, in the gap.

Q. Would you give the result of those soundings, please?

A. As near as I can remember it, it was seven feet alongside of Smith's Slough, and twelve feet at the gap.

Q. You say twelve feet at the gap?

Ans. At the opening of the boom, between the boom and the shore.

Q. That would be between the last pile and the shore?

A. Yes sir.

Q. What was the depth of water alongside of Smith's Slough?

Ans. I think I said about seven feet.

Q. How much farther had the tide to run at that time?

A. About half tide—I don't know just what the stage of the tide was that day, but it probably had about three feet to run.

Q. And what is the depth from the upper end of the boom to the shore?

Ans. As near as I could judge about twenty-five or twenty-six feet; something like that.

Q. You mean at half tide?

Ans. Yes sir.

Cross-examination.

By Mr. STRATTON:

Q. You never have attempted to go to the upper extremity of the defendant's boom with your boat since the boom was constructed, have you?

A. You mean since it was completed?

Q. Yes.

Ans. No sir.

Q. Now, you say you took soundings opposite Smith's slough. You don't know whether you took soundings just above the bar which is near Smith's slough, do you?

307 A. We sounded all along there, and the shallowest water we got was beside Smith's slough, which was seven feet.

Q. Now, where were your soundings made; were they made up close to the Nicomen Boom Co.'s boom?

Ans. We were looking for the best water, because we didn't want to run aground.

Q. Now, how far from the boom were those measurements taken, that were taken opposite Smith's slough?

A. About the width of the boat, and we were running along close to the boom.

Q. It was about fifteen feet then?

Ans. Yes, possibly.

Q. Now, didn't you take those soundings from the center of the boat, or was it from the outside?

Ans. From the outside.

Q. Now, when was it you made those soundings?

A. You mean on what date?

Q. Yes.

Ans. I don't remember. I could tell you by looking at my books.

Q. During what month; it was during the latter part of November, was it not?

Ans. No sir; it was earlier than that. I think in October sometime, although I am not certain.

Q. It was not made when the water in North river was naturally low, was it?

Ans. Why, the water was at an ordinary stage; there was no freshet on.

Q. Well, there had been some rain, had there not?

A. No, I think not enough to make a freshet.

Q. It was not at its ordinary stage in the summer time, during the dry season, was it?

Ans. I don't think—my belief is that North river at that

308 time at that point, is not affected much—at least, there is no difference much between the summer and winter season, that

is, not effected much by freshet, because the depth of water there is governed principally by the tide. It is too near the bay to be effected very much by a freshet.

Q. Now, Mr. Colter, did you take those soundings?

A. No sir, I did not. No sir; I stood by and saw the lead thrown.

Q. Who threw the line?

Ans. My brother.

Q. Did you notice what the measurement was?

A. Yes sir.

Q. You went out there for the purpose of making the measurement?

Ans. Yes sir.

Q. And for the purpose of testifying here in court?

A. No sir; I did not.

Q. You understood that the matter would come up in court?

A. I naturally supposed it would, but I was not told so. I didn't know there was any suit on at that time.

Q. Who told you to make the measurements?

Ans. Mr. Kleeb.

Q. What did he say that he wanted them for?

A. He didn't say; he said there might be a dispute, or something of the kind. I didn't know that he had made any complaint.

Q. He was with you on that event?

Ans. Which one?

Q. At the time you went to make the measurements.

A. No sir; he said he wanted to make soundings of the tract up along the boom.

309 Q. Now did you hear the testimony of the several witnesses here this morning, who said that during the month of September, at low tide, opposite Smith's slough, they attempted to row a boat up the river, just immediately outside of the defendant's boom, and that they were obliged to help themselves over the bar by means of sticking their oars in the ground?

Ans. I did.

Q. How do you account for their statement and yours; would their statement be possible and yours also?

A. Yes sir. I stated that it was about half tide when I went over there. Now, the tide—the difference between a low tide and a half tide might be twelve or fourteen feet. Now at half tide, if it was ordinary tide, it would probably be about ten feet. At low water I think the same kind of a tide would probably leave three or four feet over that bar. That—that is, that would be on nip tide, with what you call a six foot nip tide, and an extreme low run out would not probably leave over a foot there where my sounding was taken.

Q. Now, you were originally on some of the Northwestern Lumber Co.'s boats, were you not, during the time that the settlers had their little boom located at the upper extremity of what is now the defendant's boom?

Ans. Yes sir.

Q. And the Cruiser, upon which you were originally, towed logs from that boom to South Bend?

A. No, I was at that time on the mail boat.

Q. Well, during any time were you on the boat that towed logs from the boom?

Ans. I was not.

Q. Do you know, as a matter of fact, that the Northwestern Lumber Co.'s boats towed logs from there to South Bend?

310 A. Yes sir.

Q. The Cruiser is what draft?

Ans. Seven feet.

Q. And she went there and brought logs down?

Ans. Yes sir.

Q. And the draft of the Edgar is six and a half feet?

A. Rubbing seven feet.

Q. She was built for an ocean tug was she not?

A. No sir.

Q. A bar tug?

Ans. No sir; they were both built for towing logs; mill tenders.

Q. But the Cruiser went out over the bar and went down somewhere in Oregon, did she not?

Ans. She went to Coos Bay; yes sir.

Q. The water in North river is of less depth on the left hand side coming down than it is on the right, is it not?

A. Why, I think so at that place. Well, it is generally I think.

Q. The current is on the right hand side of the river, is it not?

Ans. The current follows the bend in the river.

COURT: Are there any shallow places at or near the mouth of North river, which, at low tide, would prevent a vessel, like the Laurel, from entering the river from the Harbor and going up North river?

WITNESS: Yes sir; one at Hawks Point.

Q. Are you familiar with all the bars on North river?

A. No. I am not.

Q. Are you familiar with that one in Smith's slough?

A. No, not very familiar with it.

311 Q. Are you familiar with the one——

A. (Witness interrupting.) Do you mean Smith's slough?

Q. Yes.

Ans. Only where I found it.

Q. Are you familiar with the one below the cannery?

A. At Smith Creek?

Q. Yes.

Ans. No, I am not.

Q. Are you familiar with the one at Hawks Point?

A. I have sounded it.

Q. Now, Mr. Colter, you do not mean to say, or be understood as saying, that a vessel that could go over the bars at Hawks Point and Smith Creek, could go over the Smith's slough bar at the same time,—or at the same stage of the tide, do you?

Ans. I think so.

Q. You say you are not very familiar with the Smith's slough bar,—then that is a mere guess, is it not?

A. No; well, it is a guess in one sense. A thing is bound to be a guess if you haven't taken exact measurements right down the line; it is simply a matter of judgment.

Q. Do you think that a vessel coming from the upper end of the defendant's boom, in order to get over the bar at Smith's slough, or a vessel that could get over that bar would ever be stuck at the Smith's Creek bar or the Hawks Point bar?

Ans. Well, yes; it would depend on the tide.

Q. I mean at the same stage of tide?

Ans. I don't know that there would, I don't think so.

Q. As a matter of fact, you would not think that your boat would get stuck? If you could get over one you would certainly think that you would be able to go over all of them?

Ans. Yes sir; well, we never bothered our heads much
312 after we got over the Hawks Point bar. After getting over that, we have always felt free to go on.

Q. That is because it is a bar at the mouth of the river, is it not?

Ans. Yes sir; it is the first bar we come to.

Re-redirect examination.

By Mr. ABEL:

Q. From your experience in the operation of vessels, state whether or not the new boom is an obstruction to navigation?

Mr. STRATTON: We object to that as being incompetent, irrelevant and immaterial.

(Objection sustained. Exception taken.)

(Witness excused.)

A. E. MAUPIN, being a witness called on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. ABEL:

Q. What is your name?

Ans. A. E. Maupin.

Q. What is your residence?

Ans. South Bend.

Q. How long have you resided in this county?

Ans. About sixteen or seventeen years.

Q. Have you ever lived upon North river?

Ans. I have.

Q. Have you ever been employed by Mr. P. J. McGowan?

A. I have.

Q. What time have you been in his employ since you have been on North river?

Ans. I think about eight or nine years, at different times.
313 Q. Where do you live?

Ans. Right at the cannery when I was there. I was there

some three or four months out of the year. Sometimes all of the year.

Q. What are you doing at the present time?

Ans. Working for S. M. Reed, on the launch Union.

Q. How long have you worked on the Union?

A. Since some time in June of this year.

Q. To what extent are you acquainted with North river?

A. Well, pretty tolerably well acquainted.

Q. Have you ever run boats up and down the river?

A. I have, yes sir.

Q. Now, before this new boom was put in, just state to the court the conditions met with by boats navigating up and down the river, and the conditions at this time, if you know.

A. You mean how far up one can go?

Q. Yes.

Ans. Well, unless it was very high tide I would only go up as far as the Settlers' boom. That is as far as I would go except on a very high tide.

Q. How much water does the Union draw?

Ans. Four and a half feet of water.

Q. Do persons find boats like the Union upon the waters of North river, consult the tides with reference to making their trip? That is, do they have to depend upon the tides in any degree?

Ans. Well, if it is a very low run of tide they do, yes sir.

Q. When were you last up the river?

Ans. Last Saturday.

Q. What was the condition of the river at that time, as to being navigable by the steamer Union?

Ans. It was all right as far as I went.

314 Q. How far did you go up?

Ans. I went to the upper end of the boom; of the new boom.

Q. What was the stage of the tide?

Ans. Well, I think it was about an hour and a half before low water.

Q. What difference in depth would an hour and a half's time make?

Ans. It would depend upon the run-out

Q. What run-out would there be on an ordinary tide?

A. It would probably make a foot difference.

Q. Did you experience any difficulty in running the Union up?

Ans. No sir.

COURT: When was that?

WITNESS: Last Saturday, your honor.

Q. Are you acquainted with the upper end of the new boom?

A. I have been up there once since it was put in; that was last Saturday.

Q. Can you tell the distance from the upper end of the boom to the nearest shallow place?

Ans. I could not, no sir.

Q. Did you take any soundings?

Ans. I did with a pole; that is all.

Q. Just state to the court the result, and where you took that sounding.

Ans. All along from the upper end, down about two-thirds; down about two-thirds of the way I took soundings with a pole.

Q. Just state what you did, and the result, as briefly as possible.

Ans. I found about seven and a half or eight feet of water in the shallowest places that I measured, as near as I could tell with a pole.

Q. And what was the stage of the tide?

315 A. It was an hour and a half before low water.

Q. Where did you take those soundings?

Ans. All along from the upper end of the boom down about two-thirds of the way to the lower end of the new boom.

Q. Have you ever been engaged in the towing of logs on North river?

Ans. Yes sir.

Q. To what extent?

Ans. I could not say how many logs. I have towed out of there, but I could not say how many logs. I haven't towed them myself: —I was on the boat at the time they were towed. I was working on the boat.

Q. Now, was there anything about the defendant's boom that would obstruct the towing or the rafting of logs on North river?

Ans. Not at high water; an ordinary raft would tow all right.

Q. Are there any rafts of logs made up above the upper end of the new boom? How do the logs come down the river?

A. There never is, that I know of.

Q. I will ask you whether or not you were over on North river on or about September 4th of this year?

A. I could not say just as to the exact date; I was there somewhere about that time.

Q. Did you take over the launch Union that plies for the new boom company; did you take it over at about that time?

A. Yes sir.

Q. Do you know the exact date?

Ans. No sir; I do not remember the exact date, but it was the last of August or the 1st of September.

Q. At that time, were you up above the boom, above the Nicomen boom,—up to Smith's slough?

Ans. No, I think I only went as far as the upper end of the

316 Nicomen boom Co.'s boom. There is a little shack there on the bank that I went to and left some stuff there.

Cross examination.

By Mr. WELSH:

Q. You say you were there last Saturday?

Ans. Yes sir.

Q. That was the last time you were there?

Ans. Yes sir.

Q. Now, what time of the day were you there?

A. Between eleven and twelve o'clock.

Q. How was the tide then relative to being high or low?

A. It was not a low tide; it was about a medium tide.

Q. When was the tide high on Saturday; what hour?

A. I think about six or seven o'clock in the morning, may be eight,—I don't know.

Q. It had been flowing from six or seven o'clock until eleven o'clock when you were there?

Ans. It was nearly that. We ate our dinner when we were there.

Q. Do you know what the height of the tide was on Saturday?

Ans. I don't know without looking at the table.

Q. Do you know then, as a matter of fact, of your own knowledge, how much water or how high the tide was above zero on that day at that time?

Ans. It was not a low run out, as I said. I could not say without referring to my tide table.

Q. You don't know then, do you?

Ans. Not without looking at my tide table.

Q. Now, Mr. Maupin, is it not a fact that on Saturday, the 29th, that we had a tide that was three and five tenths above zero?

317 Ans. Yes, I said I could not say without looking at my tide table.

Q. Well, now, from your knowledge and from the knowledge of your trip up there, and from what you learned from your observations and from these soundings, do you know, of your own knowledge, how much water there will be in that territory which you sounded, at extreme low tide?

A. I do not.

Q. When you started to sound you started at the extreme upper end of the boom, did you not; at the extreme upper end of the defendant's boom?

Ans. At the extreme upper end of the gap.

Q. And you sounded about two-thirds of the way down to Smiths slough?

Ans. No, to the lower end of the boom.

Q. And how much water did you find on the bar opposite, or at the mouth of Smiths slough, in North river?

A. Between seven and eight feet, as near as I could tell. I did not put the rule on the pole.

Q. You don't know how high the tide was at that time?

A. No sir.

Q. How much above zero, was it? You don't know how much above zero it was, or anything about it, do you?

A. No, not without looking at the tide table.

Q. Do you remember going up North river in company with myself, Matt Riley, E. F. Buchanan, John T. and P. J. McGowan on about the 25th day of September of this year?

A. I remember of making the trip down there; yes sir.

Q. Now, referring to defendant's identification "1," do you remember where we stopped in that river that day?

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A. About opposite Smiths slough; possibly a little below
318 Q. Do you remember what if anything, or was there a raft of piling in the river a short distance above Smiths slough, on the right bank of the river going up?

A. Yes, between the dolphins and the shore.

Q. Now, that piling at that time was what is now included in the boom of the defendant, is it not?

A. I believe so, as I understand it.

Q. In other words, as you recall, the piling did not extend outside of where the boom now is? That is, it did not extend to the east, or left bank of the river, or more properly speaking, outside of where the dolphins were then?

Ans. That piling was on the left hand side as you go up stream.

Q. Now, we stopped there about opposite Smiths slough, did we not?

Ans. Yes sir.

Q. And you and I stayed in the boat?

Ans. Yes sir.

Q. And the rest of the boys, as you recall, went up the river in a small boat?

Ans. Yes sir.

Q. Why did we not go up in the launch?

Ans. Because there were a lot of old tree tops and wind falls from the shore right along there.

Q. How much of the way?

Ans. Oh, quite a bunch of them there.

Q. Going which way?

Ans. On the right hand going up. I would not take the chances on going up in there. It is all cleaned up now.

Q. That was after we started this suit, was it not?

A. Yes sir; I think so.

Q. You remember having said at that time, do you not, that you wouldn't go up the river while that raft of piling was there,
319 because that was the deep water side, and that you could not go up on the other side?

A. I do not recall about saying that I would not go on the deep water side. I would not go on the left hand side.

Q. You mean the left side going up?

Ans. Yes sir.

Q. If those piling had not been moored there you would have gone up, would you not?

Ans. Yes sir, as far as the old boom there.

Q. Well, did you not, on or about the 25th day of September, in the presence of myself and my brother and Matt Riley and the other names I mentioned a moment ago did you not then and there state that you would not go up on the right hand side of the river, going up stream, because the deep water was on the right hand side of the river, going up?

Mr. ABEL: We would object to that as an attempt to impeach on collateral matter.

COURT: The witness may answer the question.

A. As I recall I said that I would not go up at that time. I stated at that time that I would not go up then.

COURT: Did you give any reason for saying that you would not go up at that time?

WITNESS: I did, on account of the tree tops in there.

Q. Do you know what the stage of the tide was at that time?

Ans. I don't know now, no. That was a long time ago.

Q. Do you remember where the rest of the boys went to;
320 the boys I have mentioned, do you know on what side of the river they went up in the row boat.

Ans. On the right hand side going up.

Q. Could the tree tops that you speak of, could they be seen from where you and I were in the launch?

Ans. Some of them could; some of them stuck out into the river, over the bank.

Q. How did you discover that those tree tops were there?

A. I saw them at low water.

Q. If you were navigating that river which side would you go on; would you go on the left hand side as you go up?

A. I generally take about the middle, or a little to the left hand side.

Q. Where the defendant's boom now is?

Ans. Yes sir.

Q. What were you doing up there last Saturday?

A. I went after a pile driver.

Q. Whose driver?

Ans. The Simpson Lumber Co.'s, I think.

Q. That is the driver that has been driving the boom of the defendant?

Ans. Yes sir.

Q. How far up did you go?

Ans. To the upper end of the boom; to the gap.

Q. Was the pile driver there?

Ans. No sir.

Q. Where was it?

Ans. At the lower end.

Q. What had it been doing at the upper end?

A. Mr. Hobi had asked me to go up there.

Q. What, apparently, did he want you to go up there for?

A. I didn't ask him any questions.

321 Q. He just told you to go up there?

Ans. Yes sir.

Q. Did he go with you?

Ans. He did.

Q. You manned that boat alone did you not?

A. Sometimes, and sometimes not.

Q. Did you have any one helping you?

Ans. S. M. Reed.

Q. He was at the wheel, was he not?

Ans. Yes sir.
Q. What was you doing?
Ans. When coming down I was with him.

(Witness excused.)

DON SMITH, being a witness called on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. HEWEN:

Q. What is your name?
Ans. Don Smith.
Q. Where do you reside?
Ans. On North river.
Q. How long have you resided there?
Ans. About twenty-five years.
Q. What portion of North river do you reside upon?
A. About two miles above the Nicomen boom.
Q. Do you pass up and down the river from time to time, and if so, about how often?
Ans. Generally about twice a week.
Q. What route do you usually take on coming to South Bend?
A. Down the river.
Q. Are you familiar with the waters of North river from
322 its mouth to above the upper extremity of the North Shore boom?
Ans. Pretty well.
Q. How lately have you been there?
Ans. I came through there day before yesterday.
Q. With what sort of draft have you passed up and down the river?
Ans. I generally have a dinkey to go with most of the time, and I have been up and down on all the boats that run over there.
Q. State the condition as regarding the navigability of it along the line of the North Shore boom on the right hand side, that is, on the open side; is it or is it not navigable?
Ans. It is navigable.
Q. State whether or not the construction of the boom has changed the condition of the river in that regard?
A. No, it has not.
Q. What is the depth of the water, if you know, at ordinary low tide, at the shoal place on lower North river?
A. Do you mean below, or up along by the boom?
Q. Both of them; both below the defendant's boom and opposite?
Ans. I have seen that bar below Hawks point when there was not over three feet of water there.
Q. Where is that Hawks bar?
Ans. Just outside of Hawks point.
Q. Is that below the defendant's boom?
Ans. Yes, two miles below.

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Q. About what is the depth of the water at the shallow place contiguous with the defendant's boom?

A. Well, I don't think there is a great deal of difference.

Q. State if you have had any experience in transporting products from North river to South Bend, or whether you have carried stock on scows—whether or not you have carried farm products and animals?

323 A. Yes, we generally carry what we have to take backwards and forwards.

Q. As the boom of the defendant is now constructed, what is the navigability of the river for the purpose of transporting stock and any products of the valley?

A. It is just the same as it has always been.

Q. Are you familiar with the upper extremity of the boom?

Ans. I am.

Q. Is there, or is there not, a space sufficient for the passage of logs or the commerce of that valley, reserved by the gap between the sheer boom and the main boom of the defendant?

Mr. STRATTON: That is objected to as being leading and calling for a conclusion of the witness.

COURT: The objection will be sustained.

Q. What is the width of that gap, in your opinion?

A. About one hundred and forty feet.

Cross examination.

By Mr. WELSH:

Q. Have you been employed by the defendant boom company at the new boom?

Ans. Yes. I put in the boom timber for them; part of it.

Q. When did you put that timber in?

Ans. Last summer.

Q. What kind of timber did you put in there?

Mr. ABEL: That is objected to as not being the best evidence and as being immaterial.

COURT: That objection will be sustained; it is utterly immaterial.

Q. You testified that on the bar there at Hawks point there was about three feet of water at low tide, did you not?

A. Yes sir.

324 Q. When did you make that sounding?

Ans. Well, I came up on the launch one day, and the launch stuck and I rowed clear across, and I only found about three feet of water.

COURT: When was that?

WITNESS: About three years ago.

COURT: What part of the river was that?

WITNESS: Out by Hawks point.

COURT: Near the mouth of the river?

WITNESS: Yes sir.

Q. Now, it is a fact, is it not, that at Hawks point it requires some

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one that is very familiar with the channel to follow the channel there?

Ans. I did not know that there was any channel there.

Q. You don't know that there is any channel there?

A. It is about one depth all the way across.

Q. It is very wide there, is it not; that is the widest part of the river, is it not?

Ans. Yes, I believe it is.

Q. And you have never run any steam boat on this bay, have you?

Ans. Well, a fellow would not have to run one, but he might be on one.

Q. Answer my question, have you ever run one?

A. I ran a launch a few days.

Q. How much water did it draw?

Ans. About four feet.

Q. What was the launch?

Ans. The Louise.

Q. How long ago was that?

Ans. A year ago.

Q. But most of your navigating has been done in a row boat, in a dinkey, has it not?

Ans. Yes sir; in a dinkey and a sail boat.

325 Q. How far is the bar that you speak of at Hawks point above the North river beacon in the bay?

A. I should judge about two miles from the beacon.

Q. And how far is Smith Creek bar from there?

A. From where do you mean?

Q. I mean from the beacon.

COURT: What difference does that make?

Mr. WELCH: I want to locate it.

A. I don't know how far it is from the mouth of North river to Smith Creek.

Q. I suppose your method of coming to South Bend is to come down North river, is it not?

Ans. Yes sir.

Q. What is the practice in respect to the tide, when you travel up and down the river?

Ans. I generall- start home with the ebb.

Q. And your return?

Ans. I try to get back on the flood tide.

Q. What can you say as to the navigability of the lower part of North river, particularly that part in dispute here, on ordinary water?

(Objected to as being incompetent and irrelevant. Objection overruled. Exception taken.)

A. I can get up any time of tide in a small boat.

COURT: How do you generally go up and down?

WITNESS: In a small boat.

COURT: In a row boat?

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WITNESS: Yes sir.
Q. And at low tide how is it?
Ans. Going up?
Q. Yes, or coming down, either way.
326 A. You can always come down easy enough at low tide, and you can go up if the tide is flooding.
Q. Is there any difference in traveling up the river when the tide is ebbing?
Ans. Yes sir; you would have to pull harder.
Q. What about the strength of the current?
A. Well, you would have the strength of the current to pull against.
Q. How about it with respect to the depth of the water?
A. I never had any difficulty with a small boat.
Q. Have you ever had any difficulty either since the boom was built or before?
Ans. No sir.

Cross-examination.

By Mr. STRATTON:

Q. Have you had any above the boom?
Ans. Yes sir.
Q. Have you had any alongside of the boom?
Ans. No sir.
Q. You never went down alongside the defendant's boom at low water?
Ans. I have been along there two or three times since the boom was there.
Q. But at none of those times were you there at low water?
Ans. No sir.
Q. Are you in the employ of the defendant company?
A. No sir.
Q. Have you ever been?
Ans. Not for a year.
Q. I mean the North Shore Boom Co.?
Ans. No sir.
Q. The reason why you start from here on the ebb and come back on the flood is to save rowing is it not?
327 Ans. Yes sir, to save rowing.
Q. Have you been getting out boom sticks for this boom company?
Ans. Yes sir; I worked for John Smith this summer.
Q. Well, John Smith was cutting out boom sticks for the new company, was he not?
Ans. Yes sir.
(Witness excused.)

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A. J. COLE, being a witness called on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. ABEL:

Q. What is your name?
Ans. A. J. Cole.
Q. Are you the Mr. Cole referred to by Mr. P. J. McGowan and Dan Lynn?
Ans. I believe so.
Q. Are you the person who wrote the letter which has been introduced in evidence?
Ans. I did.
Q. Now, I wish to state the conversation which Mr. McGowan spoke of.
Ans. Well, I met Mr. McGowan at Nacata about August 15th; the 13th or 15th.
Q. You mean of this year?
Ans. Yes sir; this year.
Q. How did you happen to meet him?
Ans. I happened to be at Nacata coming home, and he stopped and talked with Captain Bell of the Launch Arthur, and Bell took him over to me.
Q. I want your conversation.
Ans. The conversation that I had with Mr. McGowan?
Q. Yes.
328 Ans. Well, Mr. McGowan said he wanted some piling, and he wanted to know if I could get some out for him.
Q. What business were you engaged in?
Ans. In the logging and mill business.
Q. Were you getting out piling?
Ans. Yes sir.
Q. Who for?
Ans. Soule Logging Co. He asked me if I could get some piling and I told him that I thought I could. I asked him how many he would want, and he said about 200. I asked him what lengths he wanted and he said 30 to 35 feet, and he said from 12 to 20 inches. I then asked him how soon he would want them, and he said right away. He said that he was anxious to get them as quickly as possible. I told him that we were getting out piling, but none of that length. I told him that I had quite a lot of piling already cut that measured forty feet, and some that were down to thirty seven and even twenty-four feet. I told him that if I had to get out 200 piling of special length and size I could not do it as quickly as if I could give him piling that I had already cut. I told him that I had some fortys already cut. He said he didn't want so many fortys, that it was useless to drive so long a pile, that he could use some shorter ones down to twenty-four, possibly, because he had some work he wanted to do on the boom, and that he wanted to drive a few shorter piling from the sheer boom to the slough.

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Q. To the slough?

Ans. Yes sir, he said he would use some of the shorter piling, and that he thought he would use forty foot piles to reinforce and improve his boom; but that he did not care to have piling of that length. He said he preferred to have them from thirty to thirty-five feet. I told him that if he would take a mixed lot, that we — some from twenty-four to forty feet. I told him I could make delivery of that within a week or ten days. He said that he was very anxious
329 to get them at that time, that he wanted to use his men on the river to make this improvement right away. So he said then that he would take a mixed lot of them running from as high as forty feet down to as far as twenty.

Q. This was at what date?

Ans. Aug. 13th or 15th; I don't remember just which.

Q. When does the fishing season commence on this harbor?

A. I don't know, but I think it is a month later than that, although I am not sure. He referred to the fishing season having closed, or that it was about to close on the Columbia river, and that he was going to bring his crew over here to North river, and that he wanted the piling there at North river when they should arrive.

Q. I call your attention to the testimony of Mr. McGowan, that he told you he wanted,——

COURT: Just ask him if he heard Mr. McGowan say this or that.

Q. Did you hear Mr. McGowan on that occasion use the word "extend" or "enlarge" the Nicomen boom?

(Objected to as being leading. Ocjection overruled. Exception taken.)

A. No, he used the word "improve." He said that he could use a number of shorter piling down the slough and along the banks and a few of the longer piling to improve his boom. He said he wanted to improve it, and he did not mention extending it.

Q. What slough did he refer to, if you know?

A. I don't know; I supposed it was the McGowan slough. I asked no further questions,—he volunteered the remark.

Q. Did you furnish the piling for the new company?
330 A. I did.

Q. On what date were they ordered?

(Objected to as being incompetent, irrelevant and immaterial.)

COURT: I don't see what difference it makes? The objection will be sustained.

(Exception taken.)

Q. How many piling were ordered by the new company?

A. 1200 piling.

Q. What was the cost of those piling?

(Objected to as being immaterial. Objection sustained. Exception taken.)

Q. Did you hear the testimony of Mr. McGowan concerning the delay in delivery of this 200 piling?

Ans. I did.

SE IN CENTER

Q. When did you first deliver the first piling to the North Shore Boom Co.?

Ans. On August 31st, I believe.

Q. Where was it delivered?

Ans. They were tied up to the Old Settlers' boom on North river.

Q. Were you present at the time?

Ans. I tied them up myself.

Q. I will ask you whether or not you examined or took notice of the river above the rudder boom of the Nicomen Boom Co.?

Ans. I did.

Q. What was the condition of it at that time?

A. There were no obstructions in the river except two or three old fish trap piling driven there up beyond.

COURT: The court has exclude any further testimony on that branch of the case.

Cross-examination.

By Mr. STRATTON:

331 Q. At what time did you agree to deliver those piling to the Nicomen Boom Co. that were ordered by Mr. McGowan on the 13th or 15th of August?

Ans. I told him I would agree to deliver them within a week or ten days provided I could get a tow and if the water was good. But I told him that I would not agree to deliver them at any specified date, but I expected to have a raft towed on the 22nd of August, and that I would then try to arrange to give him at least 100 out of that raft.

Q. Where — you to deliver them?

Ans. At the North river boom.

Q. Did you deliver them at the time specified?

A. I did not.

Q. Why?

Ans. I had three reasons. Immediately after taking the contract, or I might say just after we had started the camp, and was taking water for the boiler the flood tides backed the salt water up, and the salt water got into the boiler and we had to shut down. Then immediately after getting to work we broke the engine and lost four days, and then we lost the next five days on account of labor. I notified Mr. McGowan on the 22nd that I could not fulfill the contract, and, furthermore, if I may be allowed to explain, I went out and bought piling from other parties to fulfill that contract.

Q. But you never delivered even the 100 piling to the plaintiff?

Ans. I delivered over 200.

Q. When was that?

Ans. I delivered to him seventy-four piling on the 16th of September; then delivered to him one hundred and twenty-four piling, and seven boom sticks about October 2nd.

332 Q. Well, now where were these piling at the time you delivered them to the plaintiff?

COPY BOUND CLOS

A. Which lot do you mean?
Q. I am talking about piling.
Ans. I made two deliveries. I delivered seventy-five piling at one time.
Q. Well, then we will take the seventy-five; where were they when you delivered them?
Ans. I delivered them to his boom on North river.
Q. Where did you take them from?
Ans. I bought them from the Simpson Lumber Co. It was a mixed raft of piling and logs, and I towed them to North river, and then separated them from the logs and delivered them to Mr. Lynn on September 16th or 17th, and subsequently the logs were towed to South Bend.
Q. Was that in pursuance with your contract with Mr. McGowan?
Ans. It was.
Q. What was the length of the piles you delivered to him at that time; were they not all forty foot piling?
A. No sir; they were of various lengths. They ranged as high as sixty feet, some of them.

(Witness excused.)

Mr. WELSH: We now have certified copies of the deeds, and would like to have the stenographer mark them as plaintiff's exhibit.
COURT: They may be marked as plaintiff's exhibit. The deeds purport to convey or give to Mr. McGowan the land on the site of the boom, on which the boom extends.
Mr. STRATTON: I think it is on both sides.
Mr. ABEL: We would object to each of them as being in-
333 competent, irrelevant and immaterial.
COURT: The objection will be overruled and they may be received in evidence.

PAUL NELSON, being a witness called on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. ABEL:

Q. What is your name?
Ans. Paul Nelson.
Q. Where do you reside?
Ans. Smith Creek.
COURT: Is Smith Creek the same as Smith's slough?
Mr. ABEL: No, your Honor, they are different.
Q. How long have you lived on Smith Creek?
A. About ten years.
Q. Have you ever lived on North river?
Ans. Yes sir.
Q. How long?
Ans. Oh, four, five or six months at a time, logging.

E IN CENTER

Q. How familiar are you with the four or five miles of lower North river?

COURT: You mean the four or five miles just above Smith Creek?

Mr. ABEL: Yes, your Honor.

A. I have been up and down there pretty often.

Q. I will ask you whether or not you ever did any work upon the Settlers' boom?

Ans. Yes sir.

Q. Now, where was the Settlers' Boom located with reference to the present site of the new boom?

334 Ans. I guess it would be about four or five hundred feet up above.

Q. Did you work on the Settlers' boom?

Ans. Yes sir.

Q. In a general way, briefly state what your work was?

A. I helped drive the piling.

Q. How long did that boom exist there?

Ans. Well, this was in the fall of 1894.

Q. How long did it stay there?

Ans. It stayed there until the next freshet and then it blew out and they had to drive it fresh again.

Q. What do you mean by "blew out?"

Ans. Broke out.

Q. You mean the freshet broke it out?

Ans. Yes sir.

Q. What can you say of the bed of North river where the Settlers' boom is located, and above the falls?

Mr. STRATTON: We object to that as being immaterial.

Mr. ABEL: Our purpose is to show that there is no other available site for the boom.

COURT: You are claiming a right where the boom was constructed?

Mr. ABEL: We are claiming that there is no other site.

COURT: The question in this case is as to whether or not you had a right to put it where you did put it.

Mr. ABEL: Well, the effect of this to show that there is no other place to put it.

COURT: That fact makes no difference. The objection will be sustained.

Mr. ABEL: We have several other witnesses on that point.

(Witness excused.)

335 IRA STREETS, being a witness called on the part of the defendant, after being duly sworn, testified as follows:

Direct examination.

By Mr. ABEL:

Q. What is your name?

Ans. Ira Streets.

Q. Mr. Streets, where do you reside?

COPY BOUND CLOS

Ans. Canto.
Q. That is the place referred to by the mail carrier on North river?
Ans. Yes sir.
Q. How long have you lived there?
Ans. Twelve years; the biggest part of that time.
COURT: That is how far above the defendant's boom?
WITNESS: About four miles above the upper part: You mean the Nicomen boom?
COURT: I mean the new boom.
WITNESS: About four miles.
COURT: About the upper end of it?
WITNESS: Yes sir.
Q. Have you, at any time, worked for the old boom company, the Nicomen Boom Co.?
Ans. Yes sir.
Q. When?
Ans. I first worked for them in 1900.
Q. Lately did you work for the same company?
Ans. I worked for the same company in 1901.
Q. How long?
Ans. I worked from October 1, 1901, until March, 1902.
Q. In what capacity?
Ans. As manager of the Nicomen boom during that time.
336 Q. State whether or not during that time you received any instructions respecting the logs above the Nicomen boom, above its inclosure?
Ans. Mr. McGowan instructed me that I had no care of logs above the Nicomen Boom inclosure.

(No cross examination.)
(Witness excused.)

A. B. WENTWORTH, being a witness, called on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. ABEL:

Q. What is your name?
Ans. A. B. Wentworth.
Q. Where do you reside at this time?
A. Nasel, Pacific County, Wash.
Q. How long have you lived there?
Ans. Off and on for about twenty-five years.
Q. During that period, have you been engaged at any time in work upon booms,—log booms?
Ans. Yes sir.
Q. State what experience you have had in the booming of logs, or in the operation of a boom.
Ans. I have had considerable experience off and on.
Q. Did you ever work upon the Nicomen boom?

E IN CENTER

A. Yes sir.
Q. When?
Ans. Last year about Nov. 20th; about the last of November of last year.
Q. How long were you working for that company?
A. About two months; I think about a month and a half or two months.
Q. Was that during the season that the logs were running?
A. Yes sir.
Q. Logs come down the river in the summer time?
337 A. Well, not by fresh water.
Q. I will ask you whether or not you heard the conversation between Mr. P. J. McGowan and Mr. Hobi, of the Nicomen Boom Co., respecting logs above the inclosure of the Nicomen Boom?
Ans. No sir.
Q. Between Dan Lynn and Mr. Hobi?
Ans. Yes sir.
Q. When was that?
Ans. It was after the first of December, I think, somewhere along in December.
Q. What year?
Ans. 1902.
Q. Where was this conversation?
Ans. On the Nicomen boom.
Q. Were you an employé there at that time?
Ans. Yes sir.
Q. What was the conversation with respect to logs above the inclosure of the Nicomen boom?
Ans. Mr. Hobi had some logs above there that he wanted down in the boom. They were drifting in the river above some tree tops, and he asked Dan Lynn if he would go up and shove them off into the boom and raft them out. Lynn told him he would go up and shove those logs off into the boom if he would stand the expense; that he had nothing to do with any logs above the inclosure of the boom.
Q. That who did not?
Ans. That Lynn had nothing to do with them. He was superintendent at that time of the Nicomen boom.
Q. How do logs usually come down North river, and other small rivers in Western Washington?
Ans. They generally come down with a freshet.
Q. But as to coming down in a solid body?
Ans. Not where tide water extends so far above the boom,
338 they don't generally come very thick.
Q. Is there any difference as to fresh water streams and tide water streams in that respect?
Ans. Yes sir.
Q. What is the difference?
Ans. Generally, if the tide happens to be in, they come more regular; it scatters them out, and they are not packed close together.

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Q. State whether or not there is any difference between the catching capacity of a boom, and its holding or storing capacity, and if so, what?

Ans. Yes sir; quite a little difference.

Q. Explain it to the court.

COURT: The plaintiff has shown that, and do you want to show the contrary?

Mr. ABEL: I think it shows a different state of facts.

COURT: It would go without any proof that the boom would contain more logs when closely packed together than when they run down the river in the natural way. I do not see any necessity for proof on that.

Mr. ABEL: I will state that we claim just the reverse of that as to the catching capacity.

COURT: He may answer.

A. There is in a swift stream like North river.

Q. Logs coming down a swift river, they pack very closely together and pile up pretty deep. Sometimes there are four or five logs deep. And when the water is not very swift they come down and don't work up; they spread out over the surface of the water, and therefore, they will hold more logs.

339 Q. During the time you were working on the Nicomen boom, or when you went to work there, state whether or not you had any conversation with Mr. P. J. McGowan with respect to the McGowan slough?

Ans. I did, just before I went to work there.

Q. State the conversation, please.

A. He told me he intended enlarging the slough.

COURT: When was that talk?

WITNESS: Sometime about Nov. 1st of last year. He said that he intended to enlarge the slough so that he could hold more logs in this boom.

Q. Did he give any explanation of that at that time?

A. No sir.

Q. I will call your attention to whether or not he said anything about,—as to the cost of their being on the tide flats?

Ans. Yes sir; he said something about that. He said he went to quite an expense to roll logs off the bank of the river that were not in the boom; that he had to roll them in with jack screws.

Q. In whose possession was the McGowan slough at that time?

Ans. Mr. McGowan, I believe.

Q. Are you familiar with the construction of booms, Mr. Wentworth?

Ans. Not to a very great extent.

Q. What kind of a sheer or head is usually used in western Washington streams like North river?

Mr. STRATTON: We would object to that as the witness has not shown himself competent to answer.

COURT: I don't think he has qualified himself as an ex-
340 pert in the construction of booms.

IN CENTER

Q. State whether you know the kind of a receiving place or portion of a boom that is usually used in western Washington?
Ans. Yes, I do. Most of them use a stationary sheer.
Q. And what other kind is there?
Ans. There is what they call a rudder sheer.
Q. By stationary sheer state whether or not you mean a sheer composed of dolphins?
Ans. Yes sir.
Q. And boom sticks?
Ans. Yes sir.
COURT: How do you mean? Do you mean boom sticks connected together—sticks running from the sheer boom to the main boom?
WITNESS: From the inside dolphins to the outside where it sheers them into the boom.
COURT: To prevent the logs coming in between the sheer boom and the main boom in the gap?
WITNESS: To prevent them going into the main river, through the gap, and escaping.
Q. Did you have a conversation with Dan Lynn concerning the logs stored or held at one time in the river part of the Nicomen boom?
Ans. I believe I did.
Q. Were you working on the boom at that time?
A. I was there when they first came in, I believe. The most of the logs they had came in at once—or at one time.
Q. Now, what part of the river structure of the Nicomen boom was empty at that time?
Ans. I should judge about one-third of it outside of the slough.
341 Q. You mean empty?
Ans. Yes sir.

Cross-examination.

By Mr. STRATTON:

Q. You say in tide water, or in a tide water river, logs will come straggling along, won't come fast?
A. Well, if the tide happens to be out they will not come so fast because the stream is larger as they get farther down, and they have more room.
Q. Do you mean to be understood that the logs won't come fast into the Nicomen boom?
Ans. They would come fast, yes sir; but not so fast as if the boom was put above farther, as when they start from a very small stream.
Q. Is North river a swift stream?
Ans. Yes sir; very swift. It is swifter than most streams.
Q. Was Mr. Lynn manager of the Nicomen boom while you were working there during the fall of 1902?

Mr. ABEL: That is objected to as not being proper cross-examination.
COURT: The objection will be overruled.

A. He said he was.
Q. He discharged you, didn't he?
Ans. Well, I don't know whether he did or not. I——
Q. Didn't he discharge you?
Ans. Well, I went when I got ready to go. He ordered me off the premises, but I didn't go until I got ready.
Q. He told you that he didn't have any further work for you there, didn't he?
Ans. Yes, he said that.
Q. He gave you your wages, and let you off?

Mr. ABEL: I don't know whether this is to bias the witness.
342 COURT: It is already in.

Q. Did you ever see the logs piled four and five feet deep in the Nicomen boom?
Ans. Yes sir, I have.
Q. When was that?
Ans. Just after a big freshet.
Q. Just once?
A. Yes sir; just once.
Q. You don't know of their piling up there before or after that, do you?
Ans. I was not there at any big freshet after that.
Q. As a matter of fact, is not the Nicomen boom the only boom that you ever worked on?
Ans. No sir.
Q. What other?
Ans. Nesel boom.
Q. Where is that located?
Ans. About six miles from Sunshine.
Q. Above that?
Ans. Yes sir.
Q. What is the capacity of that boom?
Ans. I have seen twenty million feet in it.

COURT: Has it been shown what the capacity of the defendant's boom is?
Mr. STRATTON: No, your Honor.

Q. What kind of a sheer did that have?
Ans. A stationary sheer.
Q. How wide is the river where that boom is, or where the sheer of the boom is?
Ans. It may be 100 yards wide.
Q. Have you ever seen any boom in western Washington with a rudder sheer on it, except that of the Nicomen boom?
343 A. Yes sir.
Q. Where?
Ans. They have one on the Lewis & Clark.
Q. Now, when the sheer of the Nicomen boom is set so the logs will be sheered into the boom, there is an opening is there not between the lower part of the sheer and the main boom?
Ans. Oh, yes sir.

Q. That opening is a couple hundred feet?
Ans. I never measured it. I don't know how far it is.
Q. What is your best judgment?
Ans. I should think eighty or one hundred feet.
Q. How long did you work on the Nesel boom?
A. Off and on for two or three years.
Q. What other boom have you worked on?
Ans. I didn't say I had worked on any other boom.
Q. How many months now, out of this two or three years, did you work on the Nesel boom?
Ans. I should say six months.
Q. Six months out of the two or three years?
Ans. Yes sir.
Q. Then your total experience consists of a month and a half on the Nicomen boom and that six months on the Nesel boom?
Ans. Yes sir.
Q. When was it you saw the boom in the Lewis & Clark?
A. Four years ago.

(Witness excused.)

ARTHUR DODWELL, being a witness called on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. HEWEN:

Q. What is your name?
344 A. Arthur Dodwell.
Q. Where do you reside?
Ans. South Bend, Wash.
Q. What is your occupation?
Ans. I am county surveyor.
Q. How long have you followed surveying?
Ans. Why, ever since the fall of 1899.
Q. State whether or not on or about the 18th of September, 1903, you made any surveys in North river with reference to this defendant's boom?
Ans. Yes sir.
Q. Well, about what was the width of North river at the upper extremity of the defendant's boom?
Ans. About two hundred feet.
Q. From the nearest pile to the dolphin of the defendant's boom, and the land on the right bank of the river going up, what was the distance?
Ans. Twenty-eight feet.
Q. About what stage of the tide was it?
Ans. It was about half tide.
Q. Did you observe the banks of the river at that place?
A. Yes sir.
Q. Are they gradual in their slope or precipitous.

A. They are pretty nearly perpendicular down at the water at the stage of tide when I saw them at that time.

Q. Do you remember what the distance was between the pivot of the boom structure of the plaintiff, of the main boom structure, to the right hand bank of the river?

A. I don't hardly catch what you mean.

Q. I will illustrate from the map, being defendant's identification "I." The distance from the central point of the boom to the right hand bank of the river?

A. One hundred and two feet.

345 COURT: You mean the distance from the center of your farthermost dolphin?

HEWEN: I mean the distance from the right hand side of the defendant's boom to the right bank of the river going up.

A. One hundred and two feet.

Q. State in regard to the width of the gap, if any existed, between the defendant's main boom and the sheer boom.

A. Well, the gap at that time was, where these dolphins were blown out, we measured the distance to be 150 feet, and we marked that for them to drive the lower extremity of that rudder boom, but, of course, since that time I have not been there.

Q. As I understand you, then, from the lower extremity of the dolphins, as being permanently constructed, to the main boom, you say was 150 feet?

A. Yes sir.

Mr. STRATTON: We move to strike that as it is immaterial what their intention was.

COURT: The objection will be overruled. Let it go in if they connected.

Q. Now, at the mouth of Smiths slough, what was the width of the river?

Ans. 250 feet.

Q. How much of that width was to the right of the defendant's boom?

Ans. 106 feet.

Q. Is that part of the channel, or that portion left open, is it a part of the boom area?

Ans. That is the part left open.

Q. What, if you know, is the distance across the boom at that point?

Ans. 144 feet.

COURT: Do you mean from bank to bank?

346 WITNESS: From the center of the river where the piling is driven, to the bank.

Q. At the mouth of the slough what is the width of the channel?

Ans. How far down do you mean?

Q. Well, shortly below where you took your measurements. The first measurement you took below?

Ans. The next measurement taken was down at the extremity of

the piling, and was used for outlines of the boom, at the lower end. It was 281 feet.

Q. How much of that was boom area, and how much was left for navigation?

Ans. I didn't measure the distance from the bank to where this piling was driven. I just measured the width of the river at this place.

Q. Did you measure the distance from the upper extremity of the plaintiff's boom, being its rudder boom, to the lower extremity of the defendant's boom?

Ans. Yes sir.

Q. How much is that?

Mr. STRATTON: We object on the ground that it is immaterial.

COURT: I don't know that it is, but let him answer.

A. 532 feet.

COURT: That is, the distance from the upper end of the plaintiff's boom to the lower end of the defendant's boom?

WITNESS: Yes sir, that is 532 feet.

COURT: That is the distance between the dolphins?

WITNESS: Yes sir; the upper and lower piling.

COURT: You mean the line of piling? As I understood the testimony the defendant's boom is not constructed the whole length.

WITNESS: No sir.

COURT: The line of piles was driven as far as they had a
347 right to,—What distance are you speaking of,—the distance between the last pile and the upper end of the plaintiff's boom?

WITNESS: The lower pile and the lower extremity.

COURT: You may state what that distance represents.

WITNESS: That represents the distance between the plaintiff's piling at the upper end of the rudder boom to the lower extremity of the defendant's piling, which they drove to outline their boom.

Q. Do you know whether or not the defendant has since, on constructing their boom, used all of the lower or southerly space that was then outlined?

A. No sir; I don't.

Q. In regard to the course of the river, what is the distance, or what was the narrowest width to the channel alongside of the plaintiff's boom?

Ans. Eighty-seven feet.

COURT: Do you mean opposite the plaintiff's boom or the defendant's boom?

WITNESS: The plaintiff's boom.

Mr. STRATTON: We move to strike the question and answer as being entirely immaterial.

COURT: I don't see what the plaintiff's boom has to do with this case at all. Still, the answer may stand.

Q. In your capacity of surveyor, have you had experience with logs—log booms and storage booms?

A. No sir; I have had none with logging booms. I have had some experience with the rafting of logs. I never have had anything to do with a boom.

348 Q. State whether or not, in the past, you have ever had any occasion to compute the storage capacity of booms, that is, of that kind?

Ans. Yes sir, I have in putting up rafts.

Q. Do you know whether or not you ever measured the dimensions of the plaintiff's boom?

Ans. Yes sir.

Q. State what the acreage capacity of this main or river boom is.

Ans. It has fourteen acres.

Q At what tide?

Ans. At low tide.

Q. Have you measured that portion of McGowan's slough occupied by the plaintiff for boomage purposes?

A. Yes sir.

Q. What did that compute?

Ans. Ten and one-half acres.

Q. Were those actual measurements or computations from a plat?

Ans. Actual measurements.

Q. State when they were made.

Ans. On October 1st.

Q. State whether or not you measured the capacity of the McGowan slough above the portion already occupied by the Nicomen boom.

Ans. Yes sir; I did.

Q. What did it amount to?

Ans. Seventeen and one-fourth acres.

COURT: What are you speaking of now?

WITNESS: The McGowan slough.

Mr. STRATTON: We object to that as being immaterial, because it is not used as a boom at all.

349 COURT: It is not shown that the plaintiff had any right to use that part of the slough for boom purposes.

Mr. HEWEN: The purpose is to show the boomage facilities of that slough.

COURT: The objection will be overruled.

(Exception taken.)

Q. What in your judgment is the most suitable and available storage area for the plaintiff's boom as shown on the map there. To be more correct, I should say, in the area in the waters shown on the plat filed with the secretary of state by the plaintiff corporation?

Mr. STRATTON: That is objected to as being entirely immaterial.

COURT: I don't know that the witness has shown himself qualified to judge of the best storage room for logs. He says he is not an expert on booming. He says he only knows about the rafting of logs.

Mr. STRATTON: We would object on the further ground that the witness has not been shown competent to testify on that point.

COURT: I don't think he has. The objection will be sustained.

Q. State what experience you have had on the subject of boom construction, for the rolling of logs, the location of boom sites, what booms you have examined and what your experience is in that line.

Ans. I have never examined any boom outside of the plaintiff's boom.

Mr. STRATTON: We will certainly object then to the wit-
350 ness testifying as to that.

COURT: The objection will have to be sustained.

Q. State what estimates you have made, if any, from the state scale in regard to the boomage capacity of an acre of boom area, in regard to an acre of storage capacity.

A. Why, about 726,000 feet to the acre.

Mr. STRATTON: We move to strike the question and answer upon the ground that the witness has not shown himself to be a competent scaler.

COURT: I don't think he has as yet. He may be qualified, but I don't think he has testified as to any qualifications as yet.

Q. Have you ever studied the method of scaling logs, and have you ever had any experience in the scaling of logs?

Mr. GUDGELL: That is objected to as leading, decidedly so.

COURT: The objection will be overruled.

A. Yes, I have had a good deal of experience.

Q. Relate what that is.

Ans. In the town of Shelton, in the rafting there.

Q. Relate as fully as you can.

Ans. I worked on the boom there at Shelton, and then on Hartstein Island.

Q. Well, have you worked anywhere else, or been conversant with the subject any other place?

Ans. Well, no, not particularly, only in the scaling of logs and measuring up logs.

Q. State whether or not, in addition to your profession as civil engineer, if you are a cruiser of timber, or have had experi-
351 ence in that line?

Ans. Yes sir, I have.

Q. What has that been?

Ans. In the employ of the railroad company for a great many years, the Northern Pacific Railway Company.

Q. In what capacity, I mean?

Ans. In running lines and cruising timber.

Q. Have you ever been employed by the United States?

A. Yes, I was in the employ of the United States government.

Q. How long?

Ans. For five years.

Q. In a similar capacity?

Ans. Yes sir.

Q. What services of this nature did you render to the government, what is your experience in that line, in the line of government employment?

Ans. I don't really understand the question.

Q. What is your experience as a cruiser of timber for the United States government?

Ans. I have had considerable experience.

Q. Now, what was it?

A. I was in the Olympic mountains.

COURT: What is this for,—to show the character of the timber on North river?

Mr. HEWEN: To show that he is acquainted with the amount of timber in a log, in a tree, and that he is therefore competent to estimate the quantity of timber in a given area of space.

COURT: I suppose anybody could do that if they knew the dimensions of the logs.

Mr. STRATTON: We will withdraw the objection, and let him answer. As the court says, I don't see that this has anything
352 to do with the case.

COURT: Go ahead and give your estimate of the capacity—storage capacity per acre of the boom.

A. I did that previously.

Mr. STRATTON: I move to strike the answer out so that he will have to answer it again.

A. Well, it was 726,000 feet.

Q. At the time you took the measurements in North river did you measure the diameter or the circumference of the piling that you there found?

Ans. In what place?

Q. Where the defendant's boom was being constructed?

A. Yes sir.

Q. What was the size of the piling being used in the defendant's boom?

COURT: The court has ruled that out repeatedly. There is no complaint made here that your boom is not constructed of piles of a proper size. The court has no doubt but what the defendant built a boom there to catch logs.

Q. Now, what was the size of the plaintiff's piles driven at that time?

Ans. Seven and a half inches and eight inches.

Q. You mean in diameter?

Ans. Yes sir.

Q. What is the size of the ordinary piling used in boom construction?

Mr. WELSH: We object to this witness testifying to anything pertaining to boom construction. He says he has never had any experience and never saw any booms.

353 COURT: I don't think it cuts any figure with the case. Whether he did it in the right way, is not for the court to say in this case.

Mr. HEWEN: It is only offered for the purpose——
COURT: Well, there has been a good deal of evidence on that point.
(Exception taken.)

Cross-examination.

By Mr. STRATTON:

Q. You say there were twenty-eight feet between the bank and the nearest part of the defendant's sheer boom?
A. Yes sir.
Q. At half tide?
Ans. Yes, the tide was about half in when we went there.
Q. Twenty-eight feet took you to the top of the bank, did it not?
Ans. To the edge of the top of the bank. At that point the bank was abrupt.
Q. You don't know but what that pile has been moved, do you?
Ans. No sir; I do not.
Q. You don't know but what the pile is closer to the shore now than when you made the measurement?
Ans. I could not say as to that; I haven't been around there since.
Q. You don't know but what there is a gap of only eight feet there now, do you?
Ans. I could not say.
Q. And you don't know whether there is at this time only 532 feet between the lower end of the defendant's boom and sheer or rudder boom of the plaintiff's structure, or not, do you?
354 Ans. No, I don't know.
Q. And you don't know but what the piling that were driven by the plaintiff were driven simply to mark the angles of its boom, do you?
Ans. I was told that it was the outline of the lower extremity of the boom.
Q. Simply the outline of their boom structure?
A. Yes sir.
Q. And that their boom structure was to be placed there?
A. Yes sir; this is the sorting part of the boom, the lower end.
Q. And you don't know but what the piles driven by the plaintiff were driven to mark the lines of plaintiff's proposed extension?
Ans. No, I don't know any more than where they told me, as to the lower end of the piling that they drove for the new boom.
Q. Who told you about that?
Ans. Why, I think it was Mr. Lovering, told me where they were.
Q. Mr. Lovering was with you in the employ of the defendant?
Ans. No, he was not.
Q. In whose employ was he?
Ans. He was not with me at the time at all.
Q. In whose employ was he?
Ans. I suppose he was in the employ of the defendant boom company.
Q. And he pointed out to you the piles which had been driven by the plaintiff?
Ans. He told me where the two lower piling were, as to the end.

Q. What ones do you refer to?
Ans. The two lower piling that were driven.
Q. Now, just show it here on the defendant's identification "A."
A. (Witness shows same marked on plat.)
355 Q. You say that you saw the piling out there that had been driven there by the plaintiff, that is the Nicomen Boom Co.?
Ans. Yes sir.
Q. Now, I say, you don't know but what this piling had been driven simply to mark the outline of his proposed boom?
A. They were all in a cluster close together?
Q. How close together,—all close together?
A. Yes sir; a cluster of three driven as dolphins.
Q. These were driven by the Nicomen Boom Co.?
A. I presume so, I was told so.
Q. Now, were those the only piling that you saw in the river on this disputed area, except those driven by the defendant?
Ans. They are the only ones.
Q. The only piling that you saw then in the river at the time you made the survey, was the cluster of three piling driven by the plaintiff near the upper end of the defendant's boom?
Ans. Yes sir.
Q. Are those the piling that you say were seven and a half and eight inches in diameter?
Ans. Yes sir.
Q. Now, you say that there is 726,000 feet in an acre of logs stored?
Ans. Yes sir; according to my figures there is.
Q. Now, what size of a log do you take into consideration in ascertaining that amount?
Ans. About an average size log of North river logs.
Q. What is the average size of North river logs?
A. About two and a half feet to the log.
Q. You mean the diameter of the log?
Ans. Yes sir; about thirty-nine inches.
Q. Do you know the average size of logs cut in the vicinity
356 of North river?
Ans. Yes sir; I am quite familiar with them.
Q. You say thirty-nine inches is the average log?
A. Yes sir, and I think about thirty feet long.
Q. Now, in ascertaining that 726,000 feet, you have scaled the logs from the small end, have you not?
A. Yes sir.
Q. Have you not taken off anything for bark?
A. I took off for bark.
Q. Then you think this is a fair estimate?
A. Yes sir; I do.
Q. What is the ordinary taper of a log which is thirty-nine inches in diameter at the small end?
Ans. Six inches on an average.
Q. The but- end of that log then would be forty-five inches?

Ans. Yes sir.

Q. I say now, the big end of the log which is thirty-nine inches in diameter at the small end, will be forty-five inches at the butt end?

Ans. Yes sir.

Q. I wish you would figure out now how many feet that log will scale—the forty-five inch log at the big end.

COURT: Does not his estimate come very close to your witnesses. I remember he said the acreage capacity was about twice the storage capacity.

Q. I would like for Mr. Dodwell to scale a forty-five inch log and see how many thousand feet would be stored in an acre.

COURT: Unless there is some conflict between the testimony of your witnesses and this one I don't see why it would be neces-

357 sary.

Mr. STRATTON: I think that he is higher.

COURT: Then the court can figure it out.

(Exception taken.)

Q. How did you make these measurements that you speak of, across the river between the gaps, and so on?

A. I made the ones up the river with a rope and then took a steel tape and measured the rope in the first place, and every fifty feet on this rope we had a flag. We had it stretched out across.

Q. Did you have a rope that was long enough to extend clear across the river?

Ans. Yes sir.

Q. Now, did you give the distance between the upper dolphin and the upper extremity of the boom, to the lower dolphin of the defendant's boom?

Ans. Did I give the distance?

Q. Yes.

Ans. Yes sir.

Q. What was that?

Ans. 150 feet.

Q. Did you measure that?

A. Yes sir.

Q. With what?

A. With a rope.

Q. Now, you don't know whether that gap is the same now as when you measured it?

Ans. No sir; because as I stated in the first place, they had blown out that dolphin that was driven in the wrong place.

Q. Which dolphin was it then that was blown out?

A. I don't know which one was blown out.

358 Q. Did you mark it down on your map?

Ans. It stood about there at the place that I marked with an "x."

Q. Now, you measured then from the dolphin, which is marked "x" down to the dolphin which I will mark "y" here. Is that the measurement?

Ans. No sir. What is this mark here? (Witness indicating.)
Q. I don't know what that mark is.
A. Well, we made it from there back.
Q. Just consider that there is no mark there, where did you make the measurement. Where did you make the measurement from this place that I have marked "y" back up the river?
Ans. Up 150 feet; that is where it was marked for me to drive that lower dolphin of the rudder boom.
Q. How was it marked?
Ans. It was marked on a boom stick.
Q. Was there a boom stick extending from the dolphin "y" up the stream?
Ans. From the dolphin "e" down stream. Yes sir; that is it. And there was a boom stick to mark the place where the dolphin was intended to be driven.
Q. And you took a rope and measured from the dolphin "y" to the middle of the boom stick?
Ans. Yes sir.
Q. And you say that was 150 feet?
Ans. Yes sir.
Q. You don't know whether that dolphin was ever driven or not at the place marked on the boom stick?
Ans. I couldn't say; I haven't been there since.
Q. Then you don't know whether the gap is 150 feet, or whether there is any gap there at all or not?
A. No; I have not been up there since.
Q. And I don't suppose you put any measurements on your map here between the points at the extremities of that 150 feet?
359 Ans. No sir.
Q. Do you know who put the marks on the boom sticks for the location of the dolphins?
Ans. Mr. Hobi.

Re-direct examination.

By Mr. ABEL:

Q. Who made that map, identification "1"?
A. Mr. Lovering made that map.
Q. Did you assist him?
Ans. In part. He drafted it himself.
Q. Are you a civil engineer?
Ans. Well, I am county surveyor.
Q. Do you know how he measured that map?
Ans. It was taken from a certified copy of the government field notes.
Q. State whether or not that map was drawn to scale according to the United States field notes?
Ans. It was.
Q. Is that map a correct representation of the water and shore lines of North river?
Ans. It is.

Mr. STRATTON: We would object to the map being offered in evidence, because this witness did not draw it.

COURT: Both the plaintiff and the defendant have referred to that map in the testimony, and it will be admitted as illustrating the evidence of the witnesses.

Admitted as Defendant's ex. 1. (Exception taken.)

Recross-examination.

By Mr. STRATTON:

Q. Now, you say that this map is drawn from the field notes
360 of the survey?

Ans. Yes sir.

Q. Now, probably the field notes were made away back in 1853, or it may have been before that?

Ans. Made forty eight years ago.

Q. Now, you don't know whether they represent a true location of this river at this time or not, after half a century, do you?

Ans. No, nor anybody else.

Q. And you don't know the different meanders of that river as shown by the field notes, or it might be 200 or 300 or 400 feet away, do you, as shown on this map from the points shown here?

Ans. No.

Mr. ABEL: We object to this line of cross examination. Their witness Mr. Clapp, testified that their plat was prepared in the same way.

COURT: The court will admit in evidence any plat used by the witnesses for the purpose of illustrating their testimony.

Mr. STRATTON: Well, we want to show that it is not correct.

COURT: The court will admit it simply as illustrating the evidence, of what the witnesses refer to.

Mr. STRATTON: I only care to ascertain as to the correctness of it. That is all.

COURT: You may do that.

Q. You cannot say whether,—what that is, as it now is?

A. I can't say, because it is taken from the only authority there is, the government notes. From the corners established, it does not describe the river. It is changed.

Q. Now, what do those figures represent?

Ans. The depth of the slough.

361 Q. Was that taken from the field notes?

Ans. No sir.

Q. You say not?

Ans. That was taken I suppose from the government chart.

Q. You say you "suppose"?

Ans. Well, Mr. Lovering put them on there.

Mr. STRATTON: If those figures are taken, as Mr. Dodwell says, from the chart, I will call the court's attention to the fact that at this point I now refer to the water on the right hand side of the river, covered by the defendant's boom as being twelve feet deep, and then

on the opposite side, or left hand, where we propose to complete or build our extension, it is three feet deep.

COURT: I will say to the counsel, in passing upon this, that I will take the testimony of witnesses as against any map that might be produced.

Redirect examination.

By Mr. ABEL:

Q. When you made the measurements that you have testified to, concerning these booms, did you find the meander corners?
Ans. I found one meander corner.

Recross-examination.

By Mr. STRATTON:

Q. How did you know it was a meander corner?
A. It was marked as a meander corner.
Q. You found one?
Ans. Yes sir,—I was not looking for any.

(Witness excused.)

362 P. F. RIXON, being a witness called on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. HEWEN:

Q. What is your name?
Ans. P. F. Rixon.
Q. What is your occupation?
Ans. Surveyor.
Q. How long have you followed that profession?
A. About twenty years.
Q. Have you ever held any official position in this county?
Ans. Yes sir.
Q. What was it?
Ans. County surveyor.
Q. Have you ever served in the capacity of surveyor with the government?
Ans. Yes sir.
Q. How long were you with the government?
Ans. Six years.
Q. What class of work?
Ans. Geological survey and forestry.
Q. Have you not been employed by any corporations and large concerns in the examination of timber?
A. Yes sir.
Q. What were they?
Ans. The Northern Pacific Railway Co. and the Northwestern Lumber Co. I have also worked for several others.
Q. How long were you with the Northern Pacific?

A. I think about four years, although I am not sure. I think it was four years.

363 Q. State whether or not you have ever made any estimates and calculations of the booming capacity for logging purposes of an acre of boomage area?

Ans. Yes sir.

Mr. STRATTON: In capacity: I don't know whether that means catching or what. Ask the witness whether that was storage or catching capacity, so as to shorten in.

Q. Has that been as to storage or catching capacities, or either?

Ans. Just a matter of figures with me. It was simply as to how many feet of logs could be held in an acre.

COURT: You mean storage capacity of a boom per acre?

WITNESS: Yes sir.

Q. Was that calculated on one deep.

Ans. Yes sir.

Q. Was it calculated with reference to logs in this locality?

Ans. Yes sir.

Q. What did you find it to be?

Ans. About 835,000 feet, estimated on spruce.

COURT: Do you mean if it is packed in, or do you allow for any vacant space in the boom?

WITNESS: Yes, all fitted in snug. Of course, if you take cedar or fir you have a different estimate altogether.

Q. In the actual capacity, what deduction, if any, would you make?

Ans. I would make a deduction of about forty per cent.

Q. For whom did you make those figures, or computation. How did you come to make it?

Ans. Well, I knew the question would be brought up, and I figured it out.

Q. By whom are you subpœnaed in this case?

COURT: The court will infer that the witness is giving

364 those figures intentionally.

(Witness excused.)

FRANK B. ROBERTS, being a witness called on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. ABEL:

Q. What is your name?

Ans. Frank B. Roberts.

Q. Where do you reside?

Ans. Montesano, Wash.

Q. Have you ever resided on North river?

Ans. Yes sir.

Q. At what point?

Ans. Vesta, Chehalis county.

Q. How far is that from the new boom?

Ans. About sixty miles, by the meander line, I believe.
Q. How long did you reside at Vesta?
Ans. About five years.
Q. During that time what was your business?
Ans. Logging most of the time.
Q. Into what stream did you put your logs?
Ans. Into North river.
Q. Have you ever been up and down North river?
A. A great many times, yes sir.
Q. Would you state to the court the general character of North river from Vesta down?

Mr. STRATTON: That is objected to as being immaterial.

COURT: I don't see how it could be. Did you float the logs down river?

365 WITNESS: Yes sir; we drove our logs each winter. We logged during the summer and drove our logs during freshet time.

Q. Is that the only season that logs can be brought down the river?
Ans. Yes, sir; about November to March, for certain.
Q. And during the other part of the year is the river capable of floating logs?
Ans. Sometimes. Sometimes as late as April, but after the 15th of March we don't count on it.
Q. Are you familiar to the extent which logging has been carried on in the North river valley?
Ans. Yes, sir.
Q. Just state to the court the extent of logging operations of the North river.
Ans. Well, my observation this spring and summer, is that there is a logging camp run by Mr. Hobi about seven miles on up above the boom.
Q. What other?
Ans. There is one engine there, and there is a lot of logging farther over, or at Artic. That is at a distance I should say of about forty miles on the meander line of the stream.
Q. What logging operations are there there?
A. There is some capstain logging there.
COURT: What is the object of all this?
Mr. ABEL: It has a two-fold purpose, your Honor. In the first place, upon the question of the capacity, and then to show the extent of the use of the river for logging purposes, and also to show the number of persons interested in logging, so as to show the total output in North river per annum.
COURT: You are going to show the amount of timber that might be carried by the stream. I don't think that that has any

366 bearing on the case.

Mr. ABEL: We shall follow it up by showing that the defendant company has a contract with all of those loggers and with this company to boom there.

COURT: If the boom company has a right to have a boom there it don't make any difference as to whether he has a contract or not. If the plaintiff has a right to construct its boom it would have a right to construct it regardless of whether you had a contract with these parties for their timber?

Mr. ABEL: It is as bearing on the question of damage.

COURT: There is no question of damages for this court to consider. This is a question of right or wrong—or of the right to be there.

(Exception taken.)

(Witness excused.)

J. W. KLEEB, being a witness called on the part of the defendant, after being duly sworn, testified as follows:

Direct examination.

By Mr. ABEL:

Q. What is your name?

Ans. J. W. Kleeb.

Q. Are you one of the two incorporators of the defendant company?

Ans. I am.

Q. Where do you reside?

Ans. South Bend.

Q. How long have you resided there?

Ans. About four years and a half.

367 Q. What business are you engaged in?

Ans. In the manufacturing business; or saw log or mill business.

Q. What is the capacity of your mill?

Ans. We cut about twenty-five million a year.

Q. Are you engaged in logging to any extent upon North river?

Ans. Yes, sir.

Q. To what extent?

Ans. I have two camps there; two engines in one camp and one in the other.

Q. How many engines are there on the river besides yours?

A. Two.

Q. Who has the other?

A. Mr. Hobi has one and Mr. Johnson has one.

Q. Mr. Johnson was the witness here for the defendant?

A. Yes, sir.

Q. I call your attention to the testimony of Mr. Cole, respecting a contract for the delivery of piles on North river; have you that contract?

Ans. I have a copy of the contract, but Mr. Cole has the original.

Q. When did you make the contract for the piling for this new boom?

Ans. On the 3rd day of July, this year.

Q. That was at the time of the incorporation of the company?

Ans. Yes, sir.

Q. State whether or not the company at that time was in contemplation of being formed by yourself and Mr. Hobi?

A. Yes, sir; it was.

Q. Pursuance to that intention what was done by yourself and Mr. Hobi with respect to preparing for this boom?

Mr. STRATTON: We object to the question on the ground
368 that the evidence sought to be elicited by it is immaterial.

COURT: He may answer the question.

A. I made a contract with Mr. Cole for 1200 piling, and a contract with Don Smith for about 5000 lineal feet of boom sticks, and also some piling.

Q. Did you do anything with respect to boom chains?

A. I ordered boom chains, yes, sir; and I made a contract with Mr. Gray for the use of the driver.

Mr. WELSH: It is understood that this is all under objection.

COURT: Yes, you may note an exception.

Q. What is the cost of the piles, boom chains, etcetera?

(Objected to as being immaterial. Objection sustained. Exception taken.)

Q. When did the work commence on the boom, Mr. Kleeb?

A. We commenced driving piling on the 4th of September.

Q. Prior to that time what was done with respect to preparing for that work?

Ans. On the 31st of August there was a raft of piling, about 400, delivered there. And on that same day we sent our Mr. West with provisions and a cooking outfit for the crew.

Q. What is the total output of your camp on North river, Mr. Kleeb?

Ans. The two camps will put in for the two years, 1903 and 1904, that are liable to be floated to tide water, about ten million feet.

Q. What proportion is that of the total output of North river?

Ans. About two-thirds.

Q. That is your own camp?

Ans. Yes, sir.

Q. And what proportion will Mr. Hobi put in?

A. He will put in about two million and a half.

369 Q. What is the rate of boomage charged by the new company?

(Objected to as being incompetent, irrelevant and immaterial. Objection sustained. Exception taken.)

Q. What was the rate charged by the old company?

(Objected to as being incompetent, irrelevant and immaterial. Objection sustained. Exception taken.)

COURT: That will have to be sustained unless there is something in the statute—there is no question here as to that.

Mr. ABEL: We offer to prove by this witness and other witnesses

that the plaintiff corporation has, up until the time of the bringing of this action, always charged sixty cents per thousand feet.

COURT: Do you contend that the statute prohibits a charge of that amount?

Mr. ABEL: No, your Honor, we do not.

COURT: Well, then you can charge what you can get when the law does not prohibit you doing so. I don't see that that has any bearing as to which of these companies has a right to construct a boom along the river. The objection will be sustained.

(Exception taken.)

Q. Have you a boom connected with your saw-mill here, Mr. Kleeb?

Ans. Yes, sir.

370 Q. Have you ever had it measured to ascertain the acreage?

Ans. Yes, sir.

Q. What is the acreage?

Ans. About seven acres.

Q. Have you ever had it full of logs?

Ans. Yes, sir.

Q. Have you ever taken an inventory of any kind, and if so, when, as to the amount of feet, board measure, in the boom when it was full?

Ans. Yes, sir; I took an inventory a year ago the 15th of last January. That is, we found out what it would hold at that time.

Q. And what was the total amount of the seven acres at that time?

Ans. I don't know just the exact amount, but I think my bookkeeper can tell that. It is something like seven million feet.

Q. These were scored?

Ans. Yes, sir, they were scored in.

Q. Who made the survey for you?

Ans. Mr. Lovering.

Q. Is he a surveyor?

Ans. Why, I guess he calls himself a surveyor.

Q. Did you ever have any conversation with P. J. McGowan during the spring of this year in your office at South Bend with respect to the capacity of the Nicomen Boom, in the presence of Mr. Hogan?

Ans. Yes, sir.

Q. State the conversation.

Ans. Mr. McGowan was in the office when I came from the launch.

COURT: When was this?

WITNESS: This was about the 10th of May of this year.

COURT: With P. J. McGowan?

WITNESS: Yes, sir.

371 *Court: When was this?*

Witness: This was about the 10th of May of this year.

Court: With P. J. McGowan?

WITNESS: Yes sir, I asked him about the charges first. I told him that forty cents was all they charged at the Nesel boom.

Mr. WELSH: We move to strike that out as being immaterial.

COURT: It will not be passed upon by the court at this time.
WITNESS: I just wanted to explain, and I will come up to it.
COURT: You need not explain anything. Just state what the conversation was in that regard.
WITNESS: Well, he said he could not make any less charge on account of the fact that he had a large boom, and it cost a good deal to make it, and that there were only a few logs.

(No cross examination.)
(Witness excused.)

(At this time adjournment is had until Friday, Dec. 4, 1903.)

Friday, December 4th, 1903, the following proceedings were had:

A. M. HAGEN, being a witness called on the part of the defendant, after being first duly sworn, testified as follows:

372 Direct examination.

By Mr. ABEL:

Q. What is your name?
Ans. A. M. Hagen.
Q. Where do you reside?
Ans. South Bend.
Q. Are you working for the Kleeb Lumber Co.?
A. Yes sir.
Q. I will ask you whether or not you were present at a conversation between Mr. P. J. McGowan and Mr. Kleeb in the office of the Kleeb Lumber Co. in South Bend, being the conversation testified to by Mr. Kleeb last evening?
A. Yes sir; I was.
Q. When was that conversation?
Ans. May, last.
Q. Briefly state the conversation.
Ans. Why, Mr. Kleep asked Mr. McGowan to reduce the charge——

Mr. WELSH: We would object to that as being incompetent, irrelevant and immaterial.
COURT: It seems to be immaterial, but he may answer the question.

A. Mr. Kleeb asked Mr. McGowan why he didn't reduce the charge, and he said he had a large boom there, and was getting only a few logs, and therefore he did not consider that he could afford to reduce the charge. He also stated that his boom would hold from twenty to thirty million, and that he could use the slough, and that if he did use the slough he could boom that many more.

Cross-examination.

By Mr. WELSH:

Mr. WELSH: We move to strike out all this evidence as to the charge.

373 COURT: I don't think it is of enough importance to strike out.

R. A. ROHARBECK, being a witness called on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. ABEL:

Q. What is your name?
Ans. R. A. Roharbeck.
Q. Where do you live?
Ans. South Bend.
Mr. STRATTON: For the sake of hastening matters we will consent to concede that this witness will testify the same as the last one.
COURT: Very well.
(Witness excused.)

ALVIN MAUPIN, being a witness called on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. ABEL:

Q. State whether or not you had a conversation with Mr. P. J. McGowan during July of this year relative to the booms on North River.

Mr. WELSH: We would object to that as being too general.

Q. Did you have a conversation; what date was it?
A. Well, it was in July, about the 26th, without looking as near as I can tell.
Q. What conversation did you have, if any, with Mr. McGowan, relative to the new boom going into North river?

374 A. There was no conversation at all, except the question came up, or I simply remarked that I understood that there was a new boom to be put in above, that is all.

Cross examination.

By Mr. WELSH:

Q. You simply told him that you had heard there would be a new boom?
Ans. Yes sir.

Mr. WELSH: We would then move to strike all the testimony of the witness, Maupin, on the ground that it is hearsay.
COURT: It may stand for what it is worth.
(Exception taken.)

Redirect examination.

By Mr. ABEL:

Q. Did Mr. McGowan say anything?
Ans. No sir.

(Witness excused.)

J. J. JOHNSON, being a witness on the part of the defendant, after being first duly sworn, testified as follows:—

Q. What is your name?
Ans. J. J. Johnson.
Q. Where do you live?
Ans. I live at Montesano.
Q. What is your business?
Ans. I am a logger.
Q. Where are you logging?
Ans. On North river,—on Salmon creek, which is tributary to North river.
Q. How far is that from the new boom?
Ans. I could not give the exact distance, but it is about
375 thirty miles.
Q. You mean up the river, following the river?
A. Yes sir.
Q. How long have you been located on North river?
A. I have been there two seasons.
Q. I wish you would state to the court briefly the manner in which the logs come down, and in about what amount.
A. Well, the logs jam in the river. There are lots of obstructions, such as trees leaning out into the river and the logs jam. They don't come very fast, because I put in 2000 logs into the river, and none of them have gotten so far down as Mr. Hobi's logs are now, and they don't come down many at a time on a freshet.
Q. What, if anything do you know concerning the booms here? Have you any knowledge concerning the operation of booms?
Ans. I have been about booms more or less since I have been logging, well, for the last fifteen or eighteen years.
Q. What can you say about the passing of logs through a boom as to the time it takes?

Mr. WELSH: We would like to cross examine the witness as to his experience on that.
Mr. ABEL: There is no objection to that.

By Mr. WELSH:

Q. Have you worked on booms?
A. A little.
Q. Where?
Ans. On Gray's Harbor.
Q. How long did you work there?
Ans. I was there a short time only.
Q. A week?

Ans. Yes sir.
Q. Who did you work for?
Ans. Well, I worked different places. I was on the Wishkah, under Frank Miller.
376 Q. Were you employed by the day?
Ans. No, I had logs in the boom and I was trying to get my own logs out.
Q. That is all, is it? You never worked on any booms in this county?
Ans. No sir.
Q. Nor on North river?
Ans. No sir.
Q. And how long have you logged in this county?
A. I have logged—in this county? I never logged in this county.
Q. You do not reside in this county?
Ans. No sir.
Q. How many times have you seen the North river boom?
A. You mean the Nicomen boom?
Q. Yes.
Ans. I never saw the Nicomen boom. I was there before the boom was built, but I have not been there since.
Q. You never saw saw-logs when they were coming down the river in a freshet, have you?
Ans. In the main river; never in the boom.
Q. How often?
Ans. Three years or over.
Q. How far above the boom did you see that?
Ans. Well, any place along the river.

Mr. WELSH: We do not believe that the witness is competent to testify.
Mr. ABEL: The court will remember the testimony offered as to how long it would take the logs to go through the boom.
COURT: But the witness has not shown himself as knowing anything about that. The objection will be sustained.
(Exception taken.)

(Continuation of direct examination by Mr. ABEL:)

377 Q. How far above the old boom, or above the old Settlers' boom, so called, are those obstructions that you refer to in the river?

(Objected to as being immaterial. Objection overruled and exception taken.)

A. Well, they are all along the river, those obstructions are.
Q. Have you ever examined North river with a view to putting in a boom, if so, when?

(Objected to as being immaterial.)
COURT: I fail to see the materiality of that. The objection will be sustained.
(Exception taken.)

Q. State whether or not you ever assisted as an incorporator, in the organization of a boom company in the vicinity of the area in dispute, and whether or not, at such time, for that purpose, you made an examination of North river to ascertain the proper site for a boom.

(Objected to as being immaterial.)

COURT: He may ask with reference to the conditions on North river.

Mr. ABEL: As to special knowledge?

COURT: You may ask him about anything about North river; that is, pertaining to this case.

Q. In a general way, describe the conditions above the cannery.

Ans. That is in tide water?

Q. Yes?

Ans. Well, the river, I consider a good river for booms in tide water. I have logged the river. It is a sluggish stream ordinarily. Of course, there are times when they have big freshets. Then, of course, it is pretty rapid, but generally considered North river is a very sluggish stream, compared with others rivers that I have
378 been on. And the river is unimproved above; there has never been any work done on the river only what loggers have done to get their logs down and there are a number of obstructions in the main river.

Q. How far down do the obstructions extend?

Ans. They extend down to tide water at least.

Q. Have you ever been on lower North river? That is, at low tide?

Ans. Yes sir.

Q. State the conditions then.

Ans. Well, the river, that is, above the cannery is pretty shallow at low tide.

Q. Did you ever try to go through at low tide?

A. I tried to go over the riffles in a small boat when I was examining the river.

Q. Who was with you at that time?

Ans. Well, yourself and John Anderson.

Q. I will ask you whether or not the three of us organized a boom corporation?

Mr. WELSH: We object to that as being immaterial.

COURT: What is the purpose?

Mr. ABEL: I am doing this simply to show the extent of his examination.

COURT: I don't think it would show the qualifications of the witness, to show the fact that he was connected with the incorporating of a boom company. It might be the only means of his knowing anything about it. I think the objection will have to be sustained. You can ask him what he knows about the conditions.

Cross-examination.

379 By Mr. WELSH:

Q. You say that North river is a very sluggish river?
A. Yes sir.
Q. Now, these obstructions you speak of as extending down as far as tide water?
Ans. That is, what I mean by "obstructions" is that there are trees that lean out from the bank in the water and obstruct the free flowing of the logs.
Q. Other than that the stream is clear, is it?
A. Well, there are snags along in the river.
Q. How far does the tide ebb and flow into North river?
A. I don't know the exact distance, but I think it ebbs and flows up as far as the falls.
Q. How many miles is that from the mouth?
Ans. I could not tell the exact distance.
Q. Well, about how far?
Ans. I should judge five miles, possibly.
Q. You say that logs come down there very slowly?
A. Yes, usually.
Q. What is the flow of the river, do you know?
A. No sir.
Q. You don't know?
Ans. No sir; I do not.
Q. As a matter of fact, don't you know that North river is what would be considered a very swift river?
A. No sir, I do not.
Q. You don't know what the flow is?
Ans. No sir; I have worked on different rivers, where logging has been done, and I believe this river is conceded to be by all a very sluggish stream.
Q. And you say that your logs have not come down yet?
380 A. No sir.
Q. Where were they put in?
Ans. At Salmon Creek.
Q. Where is that?
Ans. It empties into the river at Arctic.
Q. How far is that from the mouth of North river?
A. I should say thirty miles.
Q. How far would they have to go through Salmon Creek to reach North river?
Ans. One mile.
Q. Where are those logs now that you say you got in Salmon Creek?
Ans. I said part of them were along in North river.
Q. Above the jam?
Ans. I don't know the exact location, but they are below the mouth of the creek.
Q. North river is very shallow there, is it not?
A. Well it is not very deep.

Q. That is about thirty miles from the mouth, is it not?
A. Yes sir.
Q. So, you think they come down very slowly, because your logs have not gotten down yet, do you?
A. No, it is not the fault of the river being slow.
Q. Do you know whether you- logs are jammed in the river?
Ans. I don't know, I have not seen them.
Q. When were you there?
Ans. A few days ago.
Q. Where?
Ans. Up near the camp.
Q. Where?
Ans. On Salmon creek, and I was on the river at Arctic.
Q. How far is Arctic from the mouth?
381 Ans. I have been over there twice, and it is about thirty miles.
Q. And this is as far down North river as you have been for some time? That is, for a good many years?
A. I have not been down the North river this year at all below the mouth of the creek.
Q. You were not down there last year were you?
A. Part of the way, but not clear to the mouth of the river.
Q. You say that only a million feet come down on a freshet?
A. About a million.
Q. How do you know that, Mr. Johnson?
Ans. Well, from different ways, but by the way they jam in the river I know they can't come down.
Q. Where do they jam in the river?
Ans. All along the river. There is no particular point.
Q. Does not the jam break when there is a freshet, and all the logs come down together?
Ans. When they break they do.
Q. They don't have to come down then during a freshet do they?
Ans. No.
Q. You mean all that are in the river?
Ans. No.
Q. How many times have you seen logs come down North river on a freshet?
Ans. Well, for the past three years.
Q. Well, how far down the river have you seen those logs come?
Ans. I have seen them at different points on the river.
Q. How far above its mouth did you see those logs?
A. I have seen them twenty miles above the mouth.
Q. At a distance of twenty miles?
Ans. Yes.
Q. And no farther down the river?
Ans. No.
Q. Then you don't know, after logs get down within
382 twenty miles of the mouth of the river whether they come in fast or not, from your own knowledge?

Ans. No, I haven't been down the river.
Q. You have not seen the logs coming down during a freshet?
A. Not on the lower river.
Q. You never saw logs come into the Nicomen boom, did you?
Ans. No.
Q. Have you ever been to the old Settlers' boom?
A. Yes sir.
Q. That is above the boom of the defendant company, is it not?
Ans. I believe so.
Q. Do you know, Mr. Johnson, whether or not that old Settlers' boom was ever taken out by the freshet?

Mr. ABEL: We object to that as not being proper cross examination.

COURT: Let him answer.

A. No, I don't know of any boom ever being taken out by a freshet.
Q. Do you know whether there — any falls in that river or not?
Ans. Yes sir.
Q. About how high are those falls?
Ans. Well, I never measured them, but I should judge it is possibly an eight foot fall. That is, the full length of the falls.
Q. Are there any rapids fifteen or twenty miles above the mouth of the river?
Ans. None to speak of.
Q. There are some?
Ans. At very low water, you can see some small rapids.
Q. You cannot notice them at all when there is anything of a freshet on?
Ans. No sir.

(Witness excused.)

383 FRANK ROBERTS, being recalled on the part of the defendant, for further direct examination, testified as follows:

Direct examination.

By Mr. ABEL:

Q. Last evening you stated that you had logged on North river. Did you ever drive North river with your logs?
A. Yes sir; several times.
Q. Just state to what extent and state to the court the process gone through to get them down to the Nicomen boom.
Ans. I commenced logging there in the year 1897, and have put in logs each year since that time and drove them down North river several times during the winter. I worked on the logs during several different freshets each winter. The logs over where I was located, jammed and a good many times in going doen the river and driving them they would jam, and we would break them out with peevies. We would take a crew of men and do that work.
Q. How far down the river would they jam?

A. At different points on the way down to the falls.
Q. Did you ever have any logs jam on the falls?
A. Yes sir.
Q. Now, what was the size of those jams.
A. They would be different sizes. I have seen sometimes three or four million feet in a jam. But when they jam that much we can never get them all out on one freshet. At no time can we clean the river all out on one freshet. The water dropping from the logs before we have time to break them clear of the banks will leave them there.

384 Q. In your opinion, during the last two or three seasons, and from your own knowledge, about how many logs came down North river on a freshet; that is, to the lower part of the river?

Mr. WELSH: The witness cannot testify as to his logs.
COURT: He cannot answer unless he knows.

A. I have seen logs coming down the river, and I have been at the lower end of the river when logs were coming down. I have worked on the logs.
Q. About how many would come down on a freshet?
A. It would be a m-re rough estimate as to how many would come down the river in one freshet.
Q. What is the most that you have known to come down on one freshet?
Ans. In a rough estimate, I would say that there would probably be—we will say last winter, five or six million feet, or four or five million, something like that.
Q. How frequent are those freshets?
Ans. They occur quite frequently at times, and then possibly there will be two or three months between them during the winter, the winter season. That season extends from November to April.
Q. During the rest of the year North river is capable of floating logs?
Ans. No sir; it is quite shallow in places.
Q. What do you say the length of North river is?
A. Well, I have been up and down North river, I suppose, by the water it would be about 75 miles.
Q. Well, come on, you were speaking about North river being capable of floating logs from the falls down,—that it is not capable of floating logs any season of the year they might be put in there?

385 Ans. No sir; I would not say that from the total put in at a mile below, that it would be capable of floating logs.
Q. When you include North river you don't mean only the upper portion, at least down to that point?
A. That is all.
Q. Do you know where the old Settlers' boom was on that river?
Ans. I do.
Q. You know, as a matter of fact, that the steamer Cruiser used to go up there and tow logs down?

Ans. Yes sir.

Q. And the Edgar would do the same?

Ans. Yes sir.

Q. You know that if logs are put in a mile below the falls in North river, now, or any time during the year, those logs will come down to the mouth of the river from there?

Ans. Yes sir. I was speaking with reference to North river, from the upper part, down to a mile below the falls when I said it could be logged in the summer time.

Q. Is there timber tributary to North river below the falls?

Ans. There may be.

Q. Do you know this timber—this timber country—is there any difference in the topography of the country?

Q. Well, it is not as heavily timbered below. There may be a few saw-logs below; I don't say that there are none, for I think there is some.

Q. Now, relative to these freshets. You have stated that there is three or four million feet coming down on each freshet?

Ans. Yes sir.

Q. And that four or five million might come down; it depends on conditions, and as to how many logs are jammed?

Ans. Yes sir.

386 Q. And also as to how many logs may be placed in the river?

A. Yes sir, and how many men there are breaking the jam.

Q. When the freshets come the river is very rapid, is it not?

Ans. In shoal places it is, yes sir.

Q. Take North river, from the falls down, and it is quite rapid during a freshet, is it not, and quite a swift current?

Ans. Well, to a certain extent it is, yes sir.

Q. Now, these freshets may occur and do occur one following right after the other, do they not?

A. Well, at one time on the river I have seen them five days apart; small freshets.

Q. But they occur, and as you say, you have seen them occur right close together?

Ans. Yes sir.

Q. Now, after one freshet would end, and before another one would commence, it would be impossible to get that four or five million feet of logs out of the boom, before the next one would come down?

Ans. What boom?

Q. Well, any boom to which the logs may go?

A. Well, with the Nicomen boom I believe the logs can go up the slough.

Q. Do you know?

Ans. Yes sir; I have seen them.

Q. Under what conditions would they go up the slough?

A. On the front side.

Q. When logs would come into that boom on a freshet, as they

would come naturally, would the logs go into the boom and up the slough?

Ans. Yes, on a flood tide. Well, the logs on a freshet usually run several hours into the boom. They scatter out along the river, I suppose, or rather they do, as the tide slackens the water, work back up the stream.

387 Q. Would these logs go up the slough if they came in on an ebb tide?

Ans. No sir; I think not.

Redirect examination.

By Mr. ABEL:

Q. Has there been any logging below the falls?

Mr. WELSH: We object to that as being immaterial.

Mr. ABEL: It is for the purpose of showing the conditions.

COURT: A good deal of this testimony is immaterial, but he may answer.

A. There has been logging done below the falls.

Q. What amount?

(Objected to as being immaterial. Objection sustained. Exception taken.)

(Witness excused.)

J. H. LOVERING, being a witness called on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. HEWEN:

Q. State what occupation you are following, Mr. Lovering.

A. I am an architect.

Q. What other lines have you followed? What other business have you been in?

Ans. I have run a ranch.

Q. Well, whose work is this map, the portion of the map that I now show you? (Hands witness map.)

A. I made that.

Q. Have you had any experience in preparing maps, or making surveys, or have you necessary knowledge in the preparation of such a map?

388 Ans. Yes sir; I have had some experience.

Q. State from what information and data you prepared that map?

Ans. I made it from government plats and field notes.

COURT: Is it like the one you have?

Mr. HEWEN: Yes, illustrating the operation of the boom, the extremities.

COURT: The other map shows the boom just as well.

Q. Was it also prepared from any actual surveys or measurements?
Ans. Yes sir.
Q. Who did it?
Ans. I did it myself.
Q. State whether or not, in your opinion, that is a correct representation of North river and the upper extremity of the Nicomen boom and the defendant's boom.

Mr. STRATTON: We object to the witness giving his opinion. He can state whether it is a correct map, but that is a question of mathematical accuracy.

Q. Is that map a correct representation of North river?
A. It is as near as I can make it.
Q. Then you used care in making your measurements, and in making the drafting?
Ans. Yes sir, I did.

Mr. HEWEN: We would like to have it marked as defendant's exhibit "2," and would also like to have it marked as having been received in evidence as defendant's exhibit "2."
Mr. STRATTON: I would like to cross examine the witness before it is received in evidence.

389 Cross-examination.

By Mr. STRATTON:

Q. Did you draw the map from actual survey and from notes you took in making the survey?
Ans. I made a survey and took the measurements on the river, and made the map from the plans after that.
Q. Did you survey the river and draw that plat from the field notes that you took?
Ans. I got the section lines on the river and then measured it up and down.
Q. Did you survey the river?
Ans. No sir; I took that from the government plats and field notes.
Q. Then you don't know whether this is a correct plat of North river as it now is?
Ans. Yes, I am pretty sure it is.
Q. You say you did not survey it, but that you took it from the field notes?
Ans. They are supposed to be correct.
Q. The river may have been changed in the forty-eight years that these were made?
Ans. There is nothing to indicate it.
Q. You don't know, do you; you have not surveyed it?
A. The lines across the river are just as the government plat show them.
Q. You didn't find any meander lines or corners when you were locating it?
Ans. I located where the lines cross the river.
Q. The meander lines?

Ans. No, the section lines.

Q. I am talking about the meander lines?

Ans. I took them from the filed notes.

390 Q. You did not make the actual survey?

Ans. No sir.

Q. And you do not know whether the meander lines which you took from the government field notes are the actual meander lines of the North river at this time, or not, do you?

A. There is nothing to indicate but what they are.

Q. You don't know whether they are or not?

Ans. Why, no, of course not.

Q. You simply took that map from the field notes and assumed the river is in the same place now as when they were made?

Ans. Yes sir.

Q. Then you can't swear from your own knowledge that that is a correct map of North river at this time, can you?

A. I think I can.

COURT: Is there any difference between any of those maps of North river offered in evidence with respect to the depth of water shown at different locations on the maps, etc.?

Mr. ABEL: Your Honor, the maps are substantially the same.

Q. Did you take the depth of the water at any place in the river at the time you made this map?

Ans. No sir.

Q. Where did you get the depth of the water, that part of the map which is defendant's exhibit "1"?

A. From the government chart.

Q. When was it that you made it?

Ans. I don't remember the date of it.

Q. Do you know whether that was an old chart or a late one?

Ans. It was a late chart.

Q. How many years ago?

Ans. I don't know.

Q. You are a surveyor by profession?

391 Ans. I have some knowledge of it.

Q. Are you a civil engineer?

Ans. I don't set myself up as an engineer.

Q. Are you an architect?

Ans. Yes sir.

Q. Where did you practice that profession?

A. What do you mean, now?

Q. Where have you practiced it?

Ans. I have practices it in San Francisco, and in this county, and around in the state of Washington, and Elberta, Canada.

Q. Your principal business has been as carpenter and joiner?

Ans. Yes sir; that is my principal business.

Q. I call your attention to the figure on the right hand corner of this defendant's exhibit "2," What does it represent?

Ans. What figure do you mean?

Q. There is only one figure in the upper right hand corner of the

map, and it is marked "Section showing boom open." What does it represent?

Ans. It is intended to represent a boom to close; a movable boom stick swung out to close the gap between the sheer boom and the main boom.

Q. Now, what is this boom stick made to close—you say it is to close——

A. It is made to close up this boom here, and when not in use to leave the main stream open.

Q. That boom stick there is placed so as to close the gap between the upper end of the defendant's boom and the lower end of their sheer boom?

A. What do you call a sheer boom?

Q. Did you draw this map, defendant's exhibit "1"?

Ans. Yes sir.

Q. At the time you drew this map was there a sheer boom
392 attached to the defendant's boom—a stationary sheer?

A. I don't think there was.

Q. Do you know what a sheer boom is?

Ans. I think I do, yes sir.

Q. Then answer my question as to whether or not this boom stick which you marked on the upper right hand corner of defendant's exhibit "2" is to close the gap between the sheer and the main part of the boom?

Ans. Yes sir.

Q. Now, is this figure drawn from observing the sheer, or is it simply a representation of something that will be placed out there, or that they intended to place out there, or that could be used in guiding them—well, what was the purpose of drawing that figure?

Ans. To show how they intended to operate the upper end of their boom.

COURT: Does it represent anything that was there at the time you made your observations?

WITNESS: No sir—well, that was not there then?

Q. You don't know whether it is there now or not?

A. No sir, I do not. I could not say.

Q. You don't know what the distance is between the upper dolphin of the defendant's boom and the lower dolphin of the sheer boom?

Ans. Nothing only the distance they gave me—that they were going to put it in.

Q. Now as to these figures out here (Indicating to witness) I will just call your attention to them.

A. Those small figures there are pilings driven there to guide the logs down the stream.

Q. This figure to the right, representing timber, is next
393 to the shore is it not?

Ans. That is something like fifteen or twenty feet from the shore.

Q. How do you know?

Ans. It is what they told me it would be.

Q. You simply know from what they told you?

Ans. Yes sir.
Q. You never saw it, did you?
Ans. I told you that I had never seen it.

Redirect examination.

By Mr. HEWEN:

—. I will ask you if you found a section corner when you made this?
Ans. Yes sir.
Q. Was there anything in the condition of North river when you viewed it, by reason of the growth of trees or otherwise, or the character of its banks, which indicated whether or not the river had changed its location?
A. None that I could see.
Q. Was there, or was there not, timber growing along its bank; timbers, large trees?
Ans. Yes sir, along the left bank going up stream; some right along the bank.
Q. Is there any timber on the other side,—or how far did you go up?
Ans. Some small trees.

COURT: What difference does it make?
Mr. HEWEN: Well, if a tree had been there for 100 years, or if there was a tree there 100 years old it would indicate that this river had not changed its course.
(Objection overruled.)
Mr. HEWEN: Now, the defendant offers in evidence a
394 certified copy of the original plat filed by the defendant company with the secretary of the state of Washington, in compliance with the booming corporation act, showing the territory proposed to be appropriated.
Mr. STRATTON: We would object to the introduction in evidence of this plat, on account of its being incompetent.
COURT: Let it go in to be considered by the court at the close of the case.
(Same is marked "Defendant's Exhibit '3' ").

(Witness excused.)

NELSON GREER, being a witness called on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. ABEL:

Q. You testified yesterday for the defendant, did you not?
Ans. Yes sir.
Q. Did you work for the Nicomen Boom Co. last year?
A. I did.
Q. How long did you work for them?

Ans. Well, I went to work for them about the 18th of December, and I got through about the last of April.

Q. Did you work during the entire season?

A. Well, pretty near. I didn't get there just in time to catch the first of the rafting, but it was not very long.

Q. Did you hear the testimony of Dan Lynn concerning the largest amount of logs caught by the Nicomen boom, the amount caught in that boom at one time during last season?

395 A. I guess I did.

Q. Do you recall that circumstance—that is, the time he refers to?

Ans. Yes; you mean how many logs were in the boom at one time?

Q. Yes. I will ask you what part of the river boom that is, the main boom of the Nicomen boom was empty and not occupied by logs at that time?

Ans. Well, there was about one-third of the upper end of the main boom that was empty.

Q. I believe you stated that you were working upon the new boom at this time?

Ans. When the logs were in the boom?

Q. Yes.

Ans. Well, I am working there now.

Q. I will ask you how the new boom is constructed with respect to passing logs that are consigned to the lower boom?

A. Well, I think——

Q. Just state what arrangement there is for doing that.

A. It could be easily fixed to pass all the logs if one boom would be able to raft them. By a little work they could take them out from the new boom along the sides.

Q. How is the side arranged in that respect?

A. There is about from forty to fifty feet between the dolphins, and there are six along there that are about fifty feet long.

Q. What would you do?

Ans. Well, there are sticks between the dolphins forty or fifty feet long, and you could unshackle the sticks.

Q. What do you mean by unshackle the sticks?

A. Let them loose at one end with the chain. They can
396 be strung out—they can be swung open at the end of every stick.

Q. How long have you worked on booms?

Ans. About all my life. That is the first work that I ever did, I guess. I have worked on logs, not exactly on booms,—started in driving on rivers first.

Cross-examination.

By Mr. STRATTON:

Q. Are any of the gaps prepared now, through which you could raft logs, so that they might pass through to the boom below?

Ans. They can be unshackled at any time by a minutes work at the end of every stick.

Q. You say those sticks are from fifty to eighty feet?
A. Well, I said fifty feet.
Q. If the new boom was full of logs it would be impossible to open any of the gaps so as to pass logs out to the Nicomen boom, would it not?
Ans. Not at all, it could be very easily done.
Q. How could it be done?
Ans. By unshackling—you could take out one stick by unshackling both ends of the one stick, which will leave the gap as wide as you want it between the two ends.
Q. How would you get the logs out from the entire mass if the tide was ebbing or flooding?
Ans. You are supposed to take them out when there is not a very heavy current. You could not take them out when there is a full freshet. You could not do it if the freshet was too heavy.
Q. Because the water is so swift?
Ans. That is right.
397 Q. How long do these freshets keep up?
Ans. It is according to how large it is.
Q. Well, for a large freshet such as usually occurs?
A. Well, probably two or three days, something like that.
COURT: Can steamers go up the river when logs are coming down on a freshet?
WITNESS: Well, I have never been on a steamer at the time logs were coming down a freshet, but I should think that they could not, because it is very unhandy to go up. The logs would run into you, and you would not have much room to go through, and then it is according to how thick the logs are running.
Q. Now, if there are logs in the new boom, and the tide is ebbing or flooding, would it be possible for the new boom to pass logs to the Nicomen boom?
Ans. I think so.
Q. How would it be done?
Ans. Well, take them out of the side gap, and into the channel. It would take them down to the other boom.
Q. Can that be done while the tide is ebbing or flooding?
A. Yes, easily.
Q. And does not the current, in that case, keep the logs in one mass, and hold them so strongly that could not pass them with any success?
Ans. Well, you would use only one place, and push out what were handy there, and then go to the next place.
Q. Would it not be a very tedious and expensive process?
A. Not at all.
Q. Would it not be impracticable?
Ans. No, not exactly. A man working on a boom ought to know something.
398 Q. Well, you simply think it could be done?
A. Yes, sir; very easily.
COURT: Have you ever worked on a river where there were two booms in operation?

WITNESS: No, sir. I have worked on one two or three times, but not close enough to do work with each other. That was on the Mississippi river, in the Mississippi valley.

Q. Now, let us take a mass of logs, say a million feet, and when the tide is ebbing or flooding, could you take the logs from the center of that group and push them through there and get them through?

Ans. Yes, sir; I could do it on a flood tide. On an unusually heavy freshet we would not be obliged to do it, because you could not work any place on the river, because it would be too much of a strain on the boom.

Q. Suppose there was another mass of logs, how are you going to push those logs, the entire mass, out to that gap?

A. I would push what I could get handy, or close to that place, and then I would go the next place on down the side.

Q. I know, but you could not get them from the middle, could you?

Ans. No, not exactly; not at that time.

Q. Would you not have to wait until you had rafted your logs, to get those that were consigned to the Nicomen Boom Co., and which were on the other side of your boom; would you not have to get them out afterwards to get all that were consigned to the lower boom, in order to be able to pass them to that boom?

Ans. Not exactly. Of course, in time of rafting, I presume there would be some going through—it would be according to how many were consigned to the lower boom, and if the logs were evenly
399 mixed a few of them would go to the boom as you rafted them out.

Q. And if it took two or three months to raft them, then it would be that long before the logs consigned to the lower boom would get there?

Ans. I don't think it would take three months.

Q. How long would it take?

Ans. I think possibly you could take logs away from there, if you kept them in boom sticks all the time—I think a crew would be able to raft out the logs, push them out, and sort them, etc., in about a month or a little over.

Q. That is, you think that that could be done?

A. Yes, sir.

Q. Well, it has never been done on North river?

A. No, sir.

Q. You know that it has always taken three or four or five months to clear the logs up?

Ans. I don't know. I only worked one winter there. I went there about the 18th of December and went away some time in April.

Q. About four months?

Ans. Yes, sir.

Q. And you think it would take about that time to clean the logs up?

Ans. Well, yes, sir; by rafting, waiting on boats, and one thing and another it would take considerable time.

Q. Now, during the winter season, with logs being boomed in

North river, is it not a fact that there is little, if any flood tide in the river?

Ans. In the time of fresh water there is very little flood tide.

Q. Take it during the rainy season, from the time logs
400 commence to run down until the time they stop running down, is it not a fact that there is very little flood whether there is a freshet or not?

Ans. I have seen quite a little flood tide, and it was running considerably.

Q. But is it not true that there is very little flood in the stream during the winter period?

Ans. Well, if there is a freshet in the river—well, I have seen it in the middle of the winter with no freshet in the river.

Q. Well, take it as a general rule, in the running season, in the winter, from the time logs start to come down, is not the current generally down stream?

Ans. It is in summer, yes, because there is more or less freshet in the river at times.

Q. The flood tide does not amount to much up there in the winter time?

Ans. I don't know how it is above the boom. Of course, this year I have seen quite a little of flood tide. I noticed last winter that we did very little sorting in the pockets on flood tide in the old boom.

Q. Well, now don't you know in the center of the Nicomen boom last winter the current piled up logs four or five deep, and that it was a month before you could get them down to the end of the boom?

Ans. From the upper end of it, it did. There was more drift than anything else, and some logs piled up. I have seen logs pile up lots worse than in North river.

Q. Logs would pile up that same way in the new boom, would they not?

Ans. I don't think so.

Q. Why?

Ans. Well, because—well, it may pile as much as in the old boom.

Q. Is not the current swifter on the side that boom is on?
401 Ans. I think the logs will naturally turn and run out into there, and if it jams there it will turn the water into the place which is left open for the water to run.

Q. You think if you get your boom in there there would not be much current on the other side?

Ans. At the present?

Q. As much as there is now, on the Nicomen boom side?

A. I guess so.

Q. On the Nicomen side the current has piled logs up four and five and six deep, you say?

Ans. I didn't say so, I said two deep.

Q. You say that you said it was only two deep. How are you going to get logs out from the mass that they are in there, in order to pass them down to the Nicomen boom?

(Objected to as having been already gone over.)

COURT: The witness may answer that question.

A. It is pretty hard to tell a man anything like that who don't understand the business.

Q. Well, you are telling the court.

Ans. There are certain spots in the boom that you can't exactly handle. And there are other, which, by work, you can spread them out when the water is slack, and when you have slack tide, but in a freshet it can't be done.

Q. Well, as a rule, the slack tide is about—only about an hour, and that is all that you can work on them?

A. I have seen it more than that right in the winter time.

Q. The slack tide generally is about an hour, is it not?

A. Well, what do you mean by slack tide, either tide high or low—do you mean at either high or low water?

Q. Yes.

Ans. If it is in the winter time, a person would have slack
402 tide much longer than that, because what little freshet there is in the river—well, there is very little slack in the tide when it is going either way.

Q. Well, if it only goes either way very little, logs will still be choked two or three deep, and how are you going to get the logs out?

Ans. Find people, and have men there to handle them.

Q. If the boom is full of logs how are you going to handle them?

Ans. They can be moved by help.

Q. Well, when the boom is full, and the tide has fallen two or three feet, won't the logs jam in together to such an extent that you could not get them out and pass them to the Nicomen boom?

Ans. I presume so, but you want to catch it on high tide.

Q. You would have to work this during the period of high or slack water?

Ans. In the sorting above, along the sides, yes, sir.

Q. In the passage of those logs to the Nicomen boom below?

Ans. Yes, you would have to catch it when you could work. There are certain times when you could not work on the old boom, because the water is too low, or not right to work.

Redirect examination.

By Mr. ABEL:

Q. What would be the effect of a flood tide on a mass of logs in a boom?

Ans. Well, it will loosen them up.

(Witness excused.)

Mr. LEONARD, being called on the part of the defendant, after being first duly sworn, testified as follows:

403 Direct examination.

By Mr. ABEL:

Q. What is your name?
Ans. —— Leonard.
Q. Where do you reside?
Ans. Here in South Bend.
Q. What is your official capacity, if any?
Ans. I am county auditor.
Q. What are the papers that I now hand you? (Handing witness papers.)
Ans. Articles of incorporation of the North Shore Boom & Driving Co.
Q. They are part of the files in your office?
Ans. They are.
Q. When were they filed?
Ans. On the 26th of August, 1903.

Mr. ABEL: We would offer the paper in evidence and ask permission to substitute a certified copy.
COURT: Very well, you may do so, and same admitted as defendant's exhibit 4.
(Witness excused.)

A. J. COLE, being recalled on the part of the defendant, testified as follows:

Direct examination.

By Mr. ABEL:

Q. Have you heard the testimony of Mr. Gear here upon the stand?
Ans. Yes sir.
Q. Have you had anything to do with the booming of logs?
Ans. I have, to some extent.
Q. State whether or not it would be practicable to open the
404 sides of a boom to pass logs out?
Ans. It is.
Q. I will ask you if that is frequently done?
Ans. I have done it.

(No cross examination.)

(Witness excused.)

W. H. BOWEN, being a witness on the part of the defendant, after being duly sworn, testified as follows:

Direct examination.

By Mr. ABEL:

Q. What is your name?
Ans. W. H. Bowen.
Q. Where do you reside?
Ans. South Bend.
Q. Have you ever resided on North river?
Ans. Yes sir.
Q. How far from the new boom?
Ans. About seven miles.
Q. How long have you lived there?
Ans. Sixteen years.
Q. When did you leave there?
Ans. Two years ago on the 14th day of last February.
Q. During the operation of the Nicomen boom, state whether or not you have noticed logs above the inclosure of the Nicomen boom?
Ans. Yes sir.
Q. Did you ever do any logging yourself on North river?
A. Yes sir.
A. Just detail the circumstances with respect to logs consigned to the Nicomen boom above the upper part of its works.
Ans. What do you mean, floating down the river?
Q. Logs lodged or the like.
405 Ans. They lodge all along there and at low water they hang up on the ripples.
Q. State whether or not any question ever arose between the Nicomen Boom Co. and yourself about your logs above the upper part of its works.
Ans. I had some logs on the banks two years, and at the time Mr. Hubble had charge of the boom, and he said he supposed that I would have to put them in myself.
Q. Now, where were those logs located?
Ans. Just above the boom on the tide land. Then, after that, I saw Mr. McGowan and spoke to him about it, and he said they didn't have anything to do with logs out on the tide land.

Cross-examination.

By Mr. STRATTON:

Q. He said that the Nicomen Boom Co. was not a driving company, and did not pretend to drive logs, did he not?
A. I think he did.
Q. And that the company would not drive logs any place in the river?
Ans. I don't know what he meant by that, but he said he would not take any logs off the tide land.
Q. How far above the present sheer of the Nicomen boom were your logs located, Mr. Bowen?

Ans. I think about a mile and a half.
Q. And that was above the present location of the new boom?
Ans. Yes sir.
Q. Above the head of it?
Ans. Just above the sheer. I have not been over there, since they put the new boom in, but I think it is right above.
Q. Do you know how far the Nicomen Boom Co.'s plat extends up the river?
Ans. No sir, I do not.
406 Q. You don't know whether then these logs of yours were on the territory covered by the Nicomen Boom Co.'s plat or not, do you Mr. Bowen?
Ans. I heard it was, but I don't know.

Mr. STRATTON: We move to strike the testimony of the witness then.
COURT: The court will not regard it.

Redirect examination.

By Mr. ABEL:

Q. Now, where were these logs located with respect to the settlers' boom, so called?
Ans. Right beside the settlers' boom.

Recross-examination.

By Mr. STRATTON:

Q. How far is the settlers' boom from the head of the defendant's new boom?
Ans. I think the lower end of the settlers' boom was the upper end of the new boom.
Q. You think so?
Ans. Well, I haven't been there since they drove it, but I have been told——
COURT: You need not repeat what you have been told.
Q. And you don't know of your own knowledge, and you can't swear where the head of the new boom is, can you?
A. I have never been there.

Re-redirect examination.

By Mr. ABEL:

Q. Please examine defendant's exhibit "1" and point out to the court upon the map where the logs you refer to were on the tide lands.

(Objected to, for the reason that the witness has already testified that they were opposite the old settlers' boom. He has been over this before.)
407 Mr. ABEL: We would suggest that the counsel raises the question. The settlers' boom can be——
COURT: The settlers' boom can be readily located.

Mr. HEWEN: It is to show that it is within the territory of the plat.

Q. Please examine plaintiff's exhibit "A," being a certified copy of the plat filed with the secretary of state, and indicate upon the plat where your logs were lying.

A. (Witness examines plat.) I don't see Smith's slough here.

Q. It is not on the map?

Ans. Wherever Smith's slough is, it is just about one quarter of a mile above Smith's slough to where those logs lay.

Re-recross-examination.

By Mr. WELSH:

Q. You said it was opposite the old settlers' boom?

A. Yes sir.

Q. When you say one fourth of a mile, you don't mean to say that you ever measured it so as to be exact about it?

Ans. I can tell from the lines.

Q. Will you swear that it is one quarter of a mile?

A. I would not say, but it is about one quarter of a mile.

Q. But you would locate it more definitely by the old settlers' boom?

Ans. No, sir, I would not.

Q. Then, when you said a moment ago that they were opposite the settlers' boom, you did not mean that, did you?

A. Why, I don't know why; because the settlers' boom reaches a mile or two miles up the river.

Q. From what point?

Ans. From where they had the river blocked.

408 Q. Where was that, with reference to Smith's slough?

A. About one quarter of a mile—it might have been that much, although I never measured the ground. But it is only a short distance above Smith's slough.

(Witness excused.)

DON SMITH being a witness called on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. ABEL:

Q. What is your name?

Ans. Don Smith.

Q. Did you ever work for the Nicomen Boom Co.?

A. Yes sir.

Q. When?

A. In March of this year.

Q. In October of this year I will ask you whether or not you examined that part of North river immediately above the origin Nicomen boom with reference to the number of logs lying in the river upon the tide land?

A. Yes sir.

COURT: What difference does it make as to how many logs there were on the tide land?

Mr. ABEL: It goes to show the jurisdiction or right over that territory.

Mr. STRATTON: We will argue that we exercised jurisdiction over the territory.

COURT: I can't see the importance of it, but he may answer.

Q. How many logs were there at that time?

Ans. What was lodged along the boom, and above the boom
409 amounted to about forty.

Q. How far above the Nicomen boom were they——

A. Up to where the old settlers' boom was.

Q. All the way up?

Ans. Yes sir.

Q. State whether or not you had a conversation with P. J. McGowan relative to the McGowan slough last winter.

(Objected to as being immaterial.)

COURT: It seems to me that you have gone over that.

Mr. ABEL: It is on the question of intention, your Honor.

COURT: The objection will be sustained.

(Exception is taken.)

Q. Did you ever have any conversation with Mr. Williams while he was superintendent of the boom, in that respect?

A. Why, Williams was going up to measure the slough, I believe, a thousand feet above the back boom, so that he could tell how many piling it needed to boom the slough.

Q. When was this?

Ans. When I was working there in March, I believe.

Q. This year?

Ans. Yes sir.

Cross-examination.

By Mr. WELSH:

Q. Along about the 1st of March, wasn't Dan Lynn on North river, as superintendent of the Nicomen Boom Co., and did he not endeavor to get you to put in some piling for the Nicomen Boom Co.? Did he not tell you at that time that the boom company were going to enlarge and extend their boom?

Ans. Well, I heard that they wanted some piling, and I
410 went up there to ask him about it, and he said that they did.

Q. Who said that—was it Dan Lynn?

Ans. Yes sir.

Q. Did not Dan Lynn tell you at that time that they were going to enlarge and extend the boom?

A. No sir; he did not at that time.

Q. When did he tell you?

Ans. He was calculating to, but the way things were he was going to leave it, the way it was.

Q. You knew that they were intending to enlarge it?

(Objected to as being incompetent, irrelevant and immaterial.)
COURT: You went into the matter, and he can be cross-examined in regard to it.

(Question withdrawn.)
(Witness excused.)

J. F. HOBI, being a witness called on the part of the defendant after being first duly sworn, testified as follows:

Direct examination.

By Mr. ABEL:

Q. What is your name?
Ans. John F. Hobi.
Q. Are you the witness, with regard to whom a continuance was requested on account of sickness?
Ans. Yes sir.
Q. Where have you been the last few days?

(Objected to as being immaterial.)
COURT: Proceed.

Q. I will ask you whether or not you had a conversation with Mr. P. J. McGowan with reference to logs located above the
411 Nicomen boom this last spring?
Ans. I had.
Q. Who was present?
Ans. There was present Albert Lynn and J. J. Johnson.
Q. Where was that?
Ans. At the Hotel Albee, in South Bend.
Q. What was the conversation?
Ans. Well, he spoke about the logs that were lost, and I also asked Mr. McGowan if he would not take care of the logs above the boom and he said he had no right to take care of those above the boom that they were not in his charge until they came into his boom, and that he would not be up there to take care of our logs. And regarding the logs that he lost, he said that he would not be responsible for them.
Q. Well, there is no evidence as to the logs lost, and I do not care about that. I will ask you whether or not about that time you had any correspondence with the Nicomen Boom Co., concerning the taking of logs above their rudder boom?
Ans. I had.
Q. Please examine that letter and state what it is. (Hands witness letter.) Is that the letter you received from the Nicomen Boom Co.?
Ans. Yes sir; it is.
Q. Whose signature is that?
Ans. It is the signature of P. J. McGowan, the president of the—the president and manager of the company.
Q. When did you receive that letter?
Ans. Feb'y 13th, last.

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Mr. ABEL: We offer the letter as defendant's exhibit "5."
(No objection being offered, the same is received and marked "Defendant's exhibit "5."

412 Q. Are you one of the incorporators of the defendant company?
Ans. Yes sir.
Q. I will ask you whether or not during the month of February of this year, you took any steps with a view to the incorporation of the defendant company, and with respect to obtaining consent of the secretary of war for permission to construct and maintain a boom?

Mr. STRATTON: We object as being incompetent and immaterial. If they have any permit from the secretary of war, they can produce it, and if they have we ask them to produce it.
COURT: There is no use taking up any time with that.
Mr. ABEL: We first show what we did, and then show what permission we had.
COURT: Proceed.

Q. State what you did in respect to making application.
A. I made application to the secretary of war.
Q. State whether or not you furnished the plat.
A. I furnished a plat and specification showing the manner in which the boom would be built.
Q. I will ask you whether or not the boom was thereafter built in accordance with the specifications furnished?
A. It was.
Q. Now please examine this paper and state what it is. (Hands witness paper.)
A. That is a permit given by the secretary of war for building the boom.

Mr. ABEL: We offer the same in evidence.
Mr. STRATTON: We object to the introduction of this on
413 the ground that it is not a permit from the secretary of war and in the second place it simply purports to be direct- to Mr. John F. Hobi, and being prior to the incorporation of the defendant company.
COURT: Let it go in.
(It is received and marked as an exhibit.)
Mr. STRATTON: We would make the further objection that it does not appear where this boom is located—where the work proposed is to be located. It does not show whether it is to be in North river, or what part of North river it is to be located.
COURT: The objection will be overruled, and the same may be received in evidence, and marked defendant's exhibit 6.

Q. Who acted in your capacity as to getting this permit?
Ans. Martin Welsh.
Q. One of the attorneys for the plaintiff company?
A. Yes, sir.
Q. Now I desire to call your attention——

CLOSE IN CENTER

Mr. WELSH: We will prove by Mr. Martin Welsh, since Mr. Hobi has shown this, that Mr. Hobi desired to build a boom individually, and that this was in February of 1903, and that these plans were drawn by Martin Welsh, and that they were not the plans of this boom, and that the location was not the place that this boom is located.

COURT: You can show that.

Mr. ABEL: We shall object to counsel testifying.

414 COURT: Proceed with this witness.

Q. I call your attention to the testimony of Mr. Gray relative to blowing out the dolphin at the upper end of the new boom, and ask you to state the circumstances under which that dolphin was placed there, and how it came to be blown out?

Ans. Well, the dolphin was placed—well, both Mr. Gray and I were absent, and they didn't know exactly the place that it was to be placed, and it was placed there by mistake, and when I came back, Mr. Hudleston, the engineer, was there, and he looked at the boom to see whether or not it would obstruct navigation, and I told Mr. Hudleston that the dolphin was put in there without my consent, and that I would soon remove it, and he told me to remove it.

Q. Did the government engineer make any other objection to the new boom?

Ans. No sir. He said the boom did not obstruct navigation, and he thought, so far as he knew——

Mr. WELSH: We object to that as being hearsay.

COURT: Objection will have to be sustained.

Q. I call your attention to the location of the gap left there for navigation by the new boom company, at the head of its works, and I will ask you to explain to the court how logs are directed into the new boom, and what the purpose of the gap is, and what, if any, obstruction was ever placed there, and how it operates?

Ans. Well, the logs are sheered into the new boom by the sheer boom, and in the middle of the river there is an opening about 140 feet wide left for navigation.

415 Q. Now tell us how the sheer boom above is constructed.

A. Why, so that it will sheer the logs across the river, and so that it can be left open at all times for boats to pass through.

Q. Now, with respect to the boom stick placed across the gap. I will ask you whether or not it is to remain a fixture there?

Ans. That boom stick was placed there while building the boom before closing it in, in order to protect the piling before the piling was cinched, and then it was removed.

COURT: Do you propose, in the operation of that boom, to have the boom sticks there while logs are coming down the river?

WITNESS: It is not necessary. The logs will come into the boom without it.

Q. Do you propose to have it there?

Ans. Well, we propose to have it there in case there is a jam in the boom below, so that we could temporarily keep the logs from going through.

COPY BOUND

Q. I call your attention to what has been called the single pile at the extreme upper end of the new boom, and I will ask you under what circumstances it was placed there, and whether or not it consists of a part of the new boom?

A. That was placed there under the same circumstances, as the dolphin that was blown out. One of the men located it there when Mr. Gray and I were gone, and as it is now it does not consist of any part of the new boom.

Q. How far is that from the boom?

Ans. I should judge, without measuring it, that it is about thirty feet.

Q. At low tide, how far is it?

Ans. About eight feet.

416 Q. How does the capacity of the new boom compare with the capacity of the Nicomen boom?

Ans. I presume it is about the same.

Q. Have you ever had any experience with booms before?

A. Yes sir.

Q. What is your business?

Ans. I am a logger.

Q. Where are you logging?

Ans. I have been logging on North river for the last five years, and on this harbor for the last fifteen years.

Cross-examination.

By Mr. STRATTON:

Q. Do you know how wide the gap is between the lower dolphin of your sheer to the upper dolphin of the boom?

Ans. About 140 feet.

Q. And you say that you keep a boom stick there, and that you propose to keep it there to close this gap in case your boom gets full of logs?

Ans. No, not exactly.

Q. Is not that what you said?

Ans. I said if something unexpected happened.

Q. Wouldn't it be necessary to keep that boom stick there when the freshet season is on?

Ans. No.

Q. Will it be done?

A. Why, no.

Q. Now, you say that there is about thirty feet between the bank and the nearest portion of your boom?

Ans. Yes sir.

Q. What does that nearest portion consist of?

A. A dolphin.

Q. Has this single pile that was used there been taken out?

417 Ans. No, the pile is there yet.

Q. Have you attached any boom sticks to it?

A. Not as I have seen.

Q. Do you intend to use it?

LOSE IN CENTER

Ans. I don't see what use it is to us.

Q. Do you intend to use it?

Ans. I don't know. I don't see what use it is to us.

Q. You don't know whether you intend to use it or not?

A. I know we don't intend to use it, because I didn't built it with the other sticks. It is just a pile left there by itself.

Q. What are you going to do when the logs come down with a freshet with reference to closing the gap of that thirty feet there?

Ans. Well, the water or current—there is no current setting in there. The current all sets to the other side.

Q. You don't think any logs will come through that gap?

A. Not to amount to anything.

Q. Well, that thirty foot gap has been closed this season, has it not?

Ans. It might have been; I haven't been up there all the time.

Q. It has been closed by a boom stick lying upon the bank and down to the sheer, has it not?

Ans. No sir.

Q. Do you know it has not?

Ans. I know it has not.

Q. None of the time?

Ans. None of the time as I know.

Q. During the time that the logs are running down to the Nicomen boom, you say it was not closed?

Ans. It was not.

Q. From your personal knowledge?

Ans. When I was out there at the time it was not. I know it was not when I came out, and I know I left orders not to obstruct
418 that. I know it is open to navigation at all times.

Q. It couldn't be open to navigation if it is closed by a boom stick across there?

Ans. There is no boom stick across there.

Q. You were sick here in town?

Ans. I left my orders, or my instructions there not to place it there.

Q. It might have been there notwithstanding your instructions?

Ans. It would have been against my instructions then.

Q. You say that you asked permission of the secretary of war to construct this boom? Is that a fact?

A. Yes sir.

Q. This identical boom that you have constructed, you asked for a permit for from the secretary of war, did you?

A. Yes sir.

Q. You say that for the entire length of boom that you have constructed you asked for a permit did you?

A. Yes sir.

Q. As a matter of fact, did you not ask for a permit only in front of four lots, and were not two of those lots on each side of the river?

Ans. Not as I remember.

Q. Not as you remember. Abutting upon each description of that property did you ask permission to build your boom?

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COURT: Was the request made in writing?
WITNESS: It was supposed to be. Martin Welsh did it for me.
COURT: You can call for the original letter and have it introduced.
Mr. STRATTON: It is with the secretary of war.

Q. You say in your application then you asked for a per-
419 mission to construct this boom in front of the sub-division—in front of which you have actually constructed it?

Mr. ABEL: We object to that.
COURT: The best evidence of what was stated to the secretary of war can be—would be either the letter or a copy of it. You can ask him what was in that letter, inasmuch as he stated that he made the application.

A. Well, as I asked for the construction of the boom on the left side, on the right bank of North river, but as near as I can remember now, getting the actual description of the land and lots,—it is hard to remember the legal description of the land. I think the boom is constructed exactly the way I asked permission to construct from the war department.

Q. Did you not intend at that time, and did you not ask permission to build a boom on both sides of the river? Didn't you intend to have the boom just for your own private use, and let your logs come into it and then raft them out?

Ans. No, that would not be practicable.

Q. That is not the question; it is as to what your intention was; as to what your design was at that time. Now, in January, of this year, at the Nicomen boom, did you ask Dan Lynn, who was then manager for the Nicomen Boom Co., to drive your logs, or to break the jam, or break your logs away from the jam which was at the falls?

Ans. No sir; I never asked him to go up to the falls.

Q. Did you ask him to go any place?

Ans. I asked him to take care of the logs floating up and down on the tide above the boom.

420 Q. What did he tell you?

Ans. That he would not do it.

Q. He told you that he would not drive the logs, didn't he?

Ans. Well, it amounted to the same thing.

Q. As a matter of fact, were not the logs that you speak of at that time, above the area covered by the plant of the Nicomen Boom Co.? which is filed in the office of the secretary of state?

Ans. No sir.

Q. You are sure about that, are you?

Ans. Sure.

Q. Now, when you made your application to the secretary of war did you file any plat?

Ans. No, I just filed—Mr. Welsh made a kind of a drawing as to the sheer and the entrance to the boom, and we just sent that in with the specification in such a way that the secretary of war could get an idea of the way that we were going to construct the boom, and in a way that would not interfere with navigation.

Q. And that map was just simply a piece of a county map, was it not?

Ans. It was not a piece of a county map, as far as I remember; it was a drawing on a piece of paper.

Q. Representing North river?

Ans. Yes sir.

Q. Now, what kind of a sheer did you represent?

A. About the same as is constructed.

Q. A stationary sheer?

Ans. Well, a sheer of the kind that would not obstruct navigation.

Q. Was it a stationary sheer?

Ans. It was a stationary sheer, but it leaves an opening.

Mr. WELSH (continuing cross-examination):

Q. Mr. Hobi, in February of this year, at the time at the
421 boom, subsequent to the time that you had this other conversation with Dan Lynn in January, didn't Mr. Dan Lynn at that time inform you that at the end of the freshet season the boom company would dislodge all logs which had lodged on the banks within their territory, and drive them to their boom?

Ans. He told me that if we would pay for driving them he would go up and drive the logs down.

Q. Didn't he make the statement to you as I have said?

A. No.

Q. Did he in substance?

Ans. Well, no.

Q. Didn't you, at that time and place, also state that the Nicomen Boom Co. intended to and would extend their boom up on their territory?

Ans. No sir.

Mr. ABEL: We object as not being proper cross-examination.

Mr. STRATTON: It is an impeaching question.

Mr. ABEL: We object then as not proper impeachment.

COURT: If he requests the time and place it may stand.

Q. You received another letter, did you not, with respect to logs lodged on the bank of the Nicomen Boom Co., did you not?

Mr. ABEL: Objected to as not being proper cross-examination.

(Objection overruled.)

A. Well, several letters passed between us regarding the loss of logs and one thing and another. Probably I did.

Q. Will you now produce those letters?

Ans. I haven't them here.

422 Q. Where are they?

Ans. Well, I don't know. I have one home, over on North river, but I don't think it is of any importance.

Mr. WELSH: We demand that the letters be produced.

Mr. ABEL: We refuse.

Mr. WELSH: We want the letters from the Nicomen Boom Co.

to John F. Hobi since Jan'y 1, 1903, to May 1, 1903, and all letters received by him from the Nicomen Boom Co.

Mr. ABEL: We object to the request, your Honor, for the reason that the witness has had no opportunity to obtain them, and no reasonable notice has been given to produce the same.

COURT: Proceed gentlemen. The objection will be sustained.

(Witness excused.)

ALBERT LYNN, being a witness called on the part of the defendant, after being first duly sworn, testified as follows:

Direct examination.

By Mr. ABEL:

Q. Are you related to Dan Lyon?
Ans. Not that I know of.
Q. Did you ever live on North river?
Ans. Yes sir.
Q. How long?
Ans. About ten years and a half.
Q. Did you ever log there?
Ans. Yes sir.
Q. State whether or not you were present at the hotel Albee at South Bend, in the month of February, in this year, and
423 heard there a conversation between P. J. McGowan and Mr. Hobi?
Ans. Yes sir; I was present, and so was Mr. J. J. Johnson.
Q. State the conversation.
Ans. The conversation was with Mr. Hobi—it was in regard to the size of the boom. Mr. McGowan said he thought he had a large boom, and that there were not many logs, and that he could not afford——

Mr. WELSH: We move to strike that out.

COURT: I think counsel agreed that the other witnesses would testify the same on that subject.

Mr. ABEL: This is impeaching, your Honor.

COURT: It is simply cumulative.

Mr. WELSH: We take the position that the evidence is immaterial.

COURT: Proceed with the examination.

(Witness continuing): He said that he could not afford it; that the number of logs that came into it was not sufficient to warrant of putting in more improvements. That he wished to make some, but not a great deal.

COURT: That was the talk between Mr. McGowan and Mr. Hobi?
WITNESS: Yes sir.

(Witness excused.)

Mr. ABEL: We offer at this time, your Honor, a certificate from the secretary of state, relative to the filing of articles of the incorporation

of the defendant company, and ask that the same be marked as defendant's exhibit.

COURT: Let it go in.

424 Mr. ABEL: We will also offer the license from the secretary of state, showing payment of the license fee. We also offer in evidence certified copy of lease from the state land commissioner to W. H. Abel, together with assignment of the same to the defendant company, to the tide lands.

COURT: The tide lands on the side on which this boom is constructed?

Mr. ABEL: Yes, your Honor, and within the lines embraced within the plat, filed with the secretary of state, and I ask that they be marked as defendant's exhibit.

(No objection being offered the same is received in evidence and marked "Defendant's Exhibit "8.")

Mr. ABEL: We now offer in evidence certified copy of a contract conveying the shore rights of S. M. Reeves and wife on the right bank of the river coming down stream, in the disputed area.

COURT: On the side your boom is constructed?

Mr. ABEL: Yes, on that side to the disputed area. We would ask that this be marked "Defendant's Exhibit "10." And we also now offer in evidence a contract from S. A. Soule to James Johnson, together with the assignment thereof to the defendant company.

COURT: Purporting to carry what?

Mr. ABEL: Upland right to shore.

Mr. WELSH: We make the same objection that we made yesterday, that it does not show that this party had title, and we make

425 an objection to the instrument for the reason that it does not show that the party conveying had title at all.

COURT: The objection will be overruled and it may be received in evidence.

Defendant rests.

Plaintiff in Rebuttal.

MARTIN C. WELSH, called on the part of the plaintiff in rebuttal, after being first duly sworn, testified as follows:

Direct examination.

By Mr. STRATTON:

Q. Did you hear the testimony of Mr. Hobi this morning concerning the letter which you wrote to Major Millis, respecting a permit for the boom to be placed in North river?

A. Yes sir.

Q. Did you write a letter to Major Millis?

A. I did at that time. I understood his name was Millis.

Q. For whom were you acting?

Ans. John F. Hobi.

Cross-examination.

By Mr. ABEL:

Q. You are an attorney at law?
Ans. Yes sir.
Q. And you were at that time?
Ans. Yes sir.

426 Redirect examination.

By Mr. STRATTON:

Q. Have you at any time acted as attorney for the defendant in this case?
Ans. No sir.
Q. In any capacity whatever?
Ans. Not in the least. Shortly after I learned that they were incorporated we enjoined them.

(Witness excused.)

H. S. McGOWAN, called as a witness in rebuttal on the part of the plaintiff after being first duly sworn, testified as follows:

Direct examination.

By Mr. STRATTON:

Q. You were out to the boom of the defendant company day before yesterday, were you not, Mr. McGowan?
A. Yes sir.
Q. Were you out there today also?
Ans. Yes sir.
Q. Did you notice any changes made since you were out there day before yesterday, in the boom?

Mr. ABEL: We would object to that as not being proper rebuttal.
Mr. STRATTON: We simply want to show that the boom has been changed between day before yesterday and this time. That the boom has been moved away from the bank since day before yesterday; that the gap between the upper pile and the bank has been widened by the removal of a part of the structure.
Mr. ABEL: We object, your Honor. This witness testified on the plaintiff's case in chief. Testified to going out there, and
427 told how he found things, and I think this is simply a repetition of what the testimony was.
Mr. WELSH: It is as to what occurred since he testified.
COURT: I don't know whether it is important or material, but you may get it into the record if you want it.

A. One boom stick has been moved away from the upper end of the sheer.
Q. What difference has that made in the construction of the boom, if any?

Mr. ABEL: We make the same objection.
COURT: The objection will be overruled.

Q. How far has the boom stick been removed?
A. It has been removed entirely. I don't know where it is.
Q. Has the removal of the boom stick changed the width of the gap between the upper pile and the bank?
A. No sir; not between the upper pile and the bank.
Q. Is the gap smaller by reason of the boom stick having been taken away?
Ans. Yes sir.
Q. How much narrower?
Ans. Well, the boom stick, as it was day before yesterday, projected beyond the upper single pile not less than ten feet, and possibly, and that projected diagonally toward the bank, up stream.
Q. That is the boom stick that has been taken away?
A. Yes sir.

Cross examination.

By Mr. ABEL:

Q. What time were you there the other day?
428 A. It was about five o'clock in the evening.
Q. Was it dark?
Ans. No, it was not so dark but what I could easily see.
Q. How dark was it?
Ans. About as dark as usual at that hour, at this time of the year, on a bright day.
Q. How near were you to this boom stick which you say has been taken away?
Ans. *Teo* feet from it.
Q. What was your purpose in being there?
Ans. I went up to look after this boom.
Q. To qualify as a witness in this case?
Ans. No, not to qualify as a witness. I went up there to see the new boom.
Q. Did you take soundings at that time?
A. No, not there.

(Witness excused.)

E. G. HUNT, being recalled on the part of the plaintiff in rebuttal, testified as follows:

Direct examination.

By Mr. STRATTON:

Q. Were you up to the new boom day before yesterday?
A. Yes sir.

Mr. ABEL: We would make the same objection to this witness.
COURT: The objection will be overruled.

Q. Were you up there today?
Ans. I was.
Q. Did you notice any change in the construction of the upper portion of that new boom, and if so what was it?

429 A. On the former trip, Wednesday afternoon, the boom stick was fastened to the sheer, projecting from the single pile at the upper end of the sheer boom towards the bank. And I noticed today that that stick had been removed, and that was the only change I noticed.

Q. How many feet did the removal of the boom stick lessen the width of the gap, or widen the width of the gap.

A. I should judge from ten to twelve feet.

Q. Did you notice how the boom stick was attached to the dolphins and piling on Wednesday?

Ans. I noticed a cable on the boom stick before. That is all, I didn't notice how it was fastened particularly. I did notice a cable around the stick in question, but how that was fastened to the rest of the sheer I paid no attention to.

Q. That was a wire cable?

Ans. Yes sir; a wire cable.

(Witness excused.)

H. S. McGOWAN, recalled on the part of the plaintiff, in rebuttal, testified as follows:

Direct examination.

By Mr. WELSH:

Q. Are you acquainted with Major Millis of the United States government, in charge of the engineering department of this state?

Ans. Yes sir; I have met him.

Q. When did you meet him?

Ans. About a month or two ago.

Q. Do you remember what month it was?

Ans. It was in the latter part of October.

Q. At that time you may state whether or not he informed
430 you as to whether or not the defendant company had permission from the United States to erect a boom, and if so, state what he said.

Mr. ABEL: That is objected to as being incompetent, irrelevant and immaterial, and not the best evidence.

COURT: The objection will have to be sustained.

(Witness excused.)

J. W. KLEEB, being called on the part of the plaintiff, in rebuttal, testified as follows:

Direct examination.

By Mr. STRATTON:

Q. You are president of the defendant company, are you not?

Ans. Yes sir.

Q. Has your company made application to the war department of the United States for permission to construct a boom in North river?

Mr. ABEL: Objected to as being incompetent, irrelevant and immaterial, and not proper rebuttal.
COURT: Are you attempting to rebut testimony by that?
Mr. STRATTON: Yes, your Honor, we want to show the situation.
COURT: The objection will be overruled.

A. Not that I know of. That is, not the company after it was incorporated.

Q. Don't you know of any application having been made
431 by the company to Major Millis, to be permitted to construct a boom in North river?

Mr. ABEL: We object to that as not being the best evidence.
(Objection overruled.)

Q. Any time since they were incorporated?
Ans. No sir; I don't know anything of that kind being done. I don't know anything about it. I don't know whether it has been done or not.
Q. Do you know whether or not an application has been written or not?
Ans. I don't.
Q. Have you and Mr. Hobi talked over making application for that permission?

Mr. ABEL: We make the same objection.
COURT: The same ruling will apply.

A. Not that I remember.
Q. Have you instructed your attorneys, or any of them to draw an application for the purposes mentioned?
A. No sir; not that I know of.
Q. Any member of the company;—haven't you signed an application for leave to construct a boom in North river?
A. Not to my knowledge.
Q. You don't know anything about any application having been made by your company to Major Millis for leave to construct a boom in North river?
A. I do not.
Q. You don't know anything about it?
Ans. No sir; I do not.

Cross-examination.

By Mr. ABEL:

Q. Now, Mr. Kleeb, I will ask you whether or not prior to
432 the incorporation of the company, Mr. Hobi obtained permission on behalf of the proposed company?
A. Yes sir; he did.
Q. Is that the permission that has been introduced here?
A. Yes sir.

(Witness excused.)

P. J. McGOWAN, called on the part of the plaintiff, in rebuttal, testified as follows:

Direct examination.

By Mr. STRATTON:

Q. Mr. McGowan, did you hear the testimony of Mr. Kleeb concerning an alleged conversation with you some time last May in the office of the Kleeb Lumber Co., in the presence of Mr. Roharbeck, and Mr. Hagen; did you hear the testimony of Mr. Kleeb on that point?

Ans. I did not hear it, no.

Q. Well, state whether or not during the month of May, or at any other time, in the office of the Kleeb Lumber Co., or at any other place, you said to Mr. Kleeb, or in his presence, in the presence of Mr. Hagen or Mr. Roharbeck, that your boom was large, and the logs which came into it were only a few in number, or words to that effect?

A. No.

Q. If you had any conversation with Mr. Kleeb at that time, you may state what it was.

Ans. I had a conversation with him regarding our boom sticks, and also on the subject of giving Mr. Kleeb a rebate on his logs.

He wanted a rebate of five cents, as he was going to have a
433 good many.

Q. You may state whether or not Mr. Alvin Maupin, last July, or at any other time, stated to you that there was going to be a new boom on North river?

Ans. That is correct; that is, he stated to me that there would probably be a new boom. That is correct.

Witness excused.

At this time and during the progress of said trial, and over the objection of plaintiff and upon the request of defendant, the court took a recess for the afternoon, and together with counsel for the respective parties viewed the disputed area, including the river, the respective booms, the shore lands and improvements therein. To which plaintiff excepted.

DAN LYNN, being recalled on the part of the plaintiff, in rebuttal, testified as follows:

Direct examination.

By Mr. STRATTON:

Q. Did you hear the testimony of Mr. Gray, concerning the one pile that was driven for the plaintiff's boom extension having been blown out?

Mr. ABEL: That is objected to as having been all gone over by this witness in their main case, and that he stated he did not know how it came out.

COURT: There is no evidence at all as to how it came out.

Q. Do you know how that pile came out?
Ans. Not exactly, no. I was not there when it came out.
Q. Did you pull it out?
Ans. No sir.
434 Q. Do you know who did?
Ans. Why, the row of dolphins or piling that was pulled out was in the range or territory of the line of beacons that Mr. Gray was driving, and he had a line across the river, to bend it over in the cinching it, and he put his line on this row of dolphins, and I suppose that he bent it over.
Q. What was this line of piling driven for?
A. They were range piling for driving by.
Q. To make an outline of the boom, as I understand you?
A. Yes sir.
Q. Did you hear the testimony of Mr. Johnson as to the swiftness of the current in the river?
Ans. Yes sir.
Q. What can you say about the current?

Mr. ABEL: That is objected to, because the witness has already testified as to the swiftness of North river.
COURT: I think he did, but he may answer.

A. The current in North river is swift.
Q. Did you hear his testimony to the effect that not more than a million feet of logs could come down into a boom on one freshet?
Ans. Yes sir.

Mr. ABEL: We would make the same objection and move to strike.
COURT: The objection will be overruled.

Q. What were the facts with reference to that matter?
A. Why, if there is only a million feet loose in the river, that is all that will come in, but if they are all loose, or if there were fifty million feet, they would all come in.
Q. Do you know of several million feet having come in on one freshet?
Ans. Yes sir.
Q. Did you hear the testimony of Mr. Geer and Mr. Cole with respect to passing of logs from the new boom to the Nicomen boom?
435 Ans. Yes sir.
Q. You may state what you know about the passing of logs from the new boom.

Mr. ABEL: We make the same objection as being incompetent, irrelevant and immaterial.
COURT: The objection will be overruled.

A. Why, you mean in regard to taking logs out of the boom—out of the side of the boom?
Q. Yes.
Ans. Or out of the rafting race?
Q. Out of the sides of the boom.
A. Why, you can't take logs out of the side of a boom.

COURT: I think he testified as to that on his first examination.

Mr. STRATTON: I don't think he went into details, at all. I don't know that he was examined on that subject.

(Witness continuing:) For the reason that logs when floating are suspended in the water, or at the mercy of the current. When the tide is either flooding or ebbing they are a solid mass, and you can't get a log out possibly, you can't get one from another, or you can't get them between one another.

Q. Do you know whether or not, from your experience on North river in rafting and booming logs, it would be practicable for logs to be delivered through the side of the new boom, so that they could pass down to the Nicomen boom within any reasonable time?

Mr. ABEL: That is objected to as calling for a conclusion of the witness.

COURT: Objection is sustained. Exception taken.

436 Q. Do you know whether it would be practicable to pass logs from the side of the defendant's boom down to the lower boom?

Ans. Yes, I think it—I think I know.

Q. Would it, or would it not be?

Ans. It would not be.

Q. For the reasons that you have already stated?

A. Yes sir.

Q. Did you have any conversation at any time concerning the driving of logs that were above the Nicomen boom and within the area of the Nicomen Boom Co.?

A. Yes sir.

Q. What was that conversation?

Ans. Well, Mr. Hobi wanted me to drive the logs from the head of tide water.

COURT: Did the witness not testify as to that on direct examination?

Mr. STRATTON: I don't think so.

COURT: I think he did, but let him answer if there is any doubt about it.

A. I told him that I had no authority to drive the logs on North river above the Nicomen Boom Co.'s boom, but that I would write to the company and see what they said in regard to the matter.

Q. Did you ever have any other conversation with them about it?

Ans. Yes sir.

Q. What was it?

Ans. I afterwards wrote to the company, and Mr. Hobi brought the mail in on Saturday, and he had an answer to the letter that I had written to the company, and he delivered the mail to me and started to pull away, and in the meantime I happened to look at the letter and I saw what it was, and I called him back. I told him that

437 the Nicomen Boom Co. had instructed me to drive the logs at Mr. Hobi's expense—to drive them any time at the end of the freshet season, or rafting season, to clear the river.

Q. That is, what part of the river?
Ans. All the way up, I suppose.
Q. How far up?
Ans. As far as tide water extended.
Q. That is, to drive all those logs that were above the old boom, as far as tide water extended, into your boom?
A. Yes sir. I could not relate just what the letter stated.
Q. Were you over to the Nicomen boom and the new boom last week, or day before yesterday?
Ans. No sir.
Q. Were you over there today?
Ans. Yes sir.
Q. When were you there before today?
Ans. I could not tell you the day.
Q. About how many days ago?
Ans. It was eight or nine days ago.
Q. Have any changes in the boom, in the new boom, been made at the upper end of it since you were there the last time?

Mr. ABEL: We will make the same objection.
COURT: The same ruling will apply.

A. Yes sir.
Q. You may state to the court what that change is.
A. When I was there the last time there was a continuous string of boom sticks down inside of the defendant's boom and a boom stick reaching from the bank. I started from the bank and continued on down inside the row of dolphins to the lower end of the boom.
438 Q. How does the boom differ today from that state of facts?
Ans. Today there was a boom stick taken out just below the sheer and also a boom stick had been taken out at the bank, or reaching the bank. That is, the two were taken out.
Q. That reached from the bank to the sheer?
Ans. To the sheer; it was a continuous row of boom sticks when I was there last.

Cross-examination.

By Mr. ABEL:

Q. Did you have any boom sticks at the end of the defendant's upper boom?
Ans. Today?
Q. No, at the time you left too?
Ans. At the end; no sir.
Q. Did you along about the sheer of the defendant's boom?
Ans. At the sheer?
Q. At the sheer.
Ans. No sir.
Q. Did you cross the gap?
Ans. What gap?
Q. The gap left for navigation?

Ans. I didn't see any gap there.
Q. At the end of the sheer?
Ans. I did not know where the sheer was.
Q. You will swear to that?
Ans. I was just to the bend.
Q. You swear that you don't know where the sheer of the defendant's boom was located?
Ans. The sheer?
Q. Now answer; don't you know where the sheer of the defendant's boom is located?
439 Ans. Yes sir.
Q. Did you string any boom sticks there?
Ans. At the sheer?
Q. Along there in that locality?
Ans. Not on the sheer.
Q. Where did you string them?
Ans. We had three boom sticks in the river.
Q. Whereabouts?
Ans. In the middle of the river.
Q. What were they doing there; what were they there for?
A. They were there where we had started to drive.
Q. Were you driving boom sticks?
Ans. No sir.
Q. What did you have them there for then?
A. We had them there to place alongside of the dolphins.
Q. You had a dolphin there, did you?
A. A dolphin?
Q. Yes.
Ans. Yes sir.
Q. You say you drove range beacons; what do you mean by range beacons?
Ans. I mean piling.
Q. Those fish trap piling?
Ans. Yes sir; I don't know the difference between fish trap piling and any other piling.
Q. Do you know the difference between fish trap piling and piling that is ordinarily used in boom structures?
A. Some fish trap piling are the same size that are ordinarily used in boom structures.
Q. Will you swear that the piling on Willapa Harbor are all the same size as piling used for boom structures?
A. No sir.
440 Q. You don't know the difference then between a fish trap piling and a boom piling?
Ans. It depends upon what size piling you are driving in the trap, and what size piling you are driving in the boom.
Q. These piling, or dolphins of piling that you were driving were very small piling,—much smaller than those used in the new boom?
Ans. Yes sir.
Q. Why did you drive small piling right at the bend of the river?

Ans. To mark the river so that we could drive from one angle point to the other.

Q. Did you drive dolphins, that is, a bunch of piling, for a mark?

Ans. Yes sir, where they are light.

Q. Would not one answer the purpose?

Ans. It might in some men's estimation.

Q. You think a man could see a half dozen in a bunch better than one?

Ans. No sir.

Q. Then why did you drive a bunch of piling at the corner, or at the elbow of the river?

Ans. Because we were liable to have a small freshet at any time, and we wished,—the logs coming down would break a small piling off, and that would destroy our mark.

Q. You expected the logs to collect there, then, did you?

A. No sir.

Q. The result would be that the logs would collect there, would it not?

Ans. I don't think so, in my estimation.

Q. Where would they go?

Ans. Down the river, if there was no obstruction.

Q. Was there an obstruction?

Ans. There was nothing before these piling were driven.

Q. You were driving an obstruction then?

441 Ans. Yes sir.

Q. Did you make the remark when you drove these: "Do you know what it is to cork fish traps?"

Ans. To whom?

Q. Did you make that remark?

Ans. Yes sir.

Q. What did you mean by that remark?

A. I could not say just what I did mean.

Q. Do you refuse to say you meant?

A. (No answer.)

Q. Why can't you say?

Ans. Well, I don't know what I meant by it. Mr. Gray came down the river and asked me what I was doing. Always, when we pass one another we exchange some word or another, and I said, "Don't you know what it is to cork fish traps?"

Q. Was that with reference to the work you were doing?

A. No sir.

Q. What was it with reference to?

Ans. I supposed at that time I was alluding to driving traps; that I was driving a trap, or something there,—I don't know what it was. It has been a long time ago.

Q. You don't know what you were referring to when you made that remark?

Ans. No sir.

Q. Did you suppose that you were driving a fish trap there?

Ans. No sir; I knew I was not. I didn't think it was any of Mr. Gray's business.

Q. You said, it is not practicable to take logs out of the side of the new boom?

Ans. Out of the side of the new boom?

Q. Yes, do you?

Ans. It would not be practicable to take logs out of the side of the boom.

442 Q. Did you ever see that done? logs being——

Mr. STRATTON: Had you finished your answer to that question?

WITNESS: No sir.

COURT: His testimony was that it was not practicable.

WITNESS: No sir; it would not be.

Q. What is the balance of your answer. That is what you said, wasn't it?

Ans. You mean taking logs out of the side of the boom, in sorting for your boom?

Q. Yes.

Ans. You can take logs out of the side of a boom in sorting, if your boom is empty above. You can let the logs float up above, and to a certain point in the boom, and place a boom stick across the boom, and as your brands come by that you want to boom, you can take them out of the boom and let the sorted logs run down.

Q. Did you ever see any logs put out of the side of any other boom?

Ans. No other boom, no sir. I have not said that I ever saw any taken out of the side of any boom.

Q. Have you, in fact?

Ans. What is the question, please.

Q. Have you ever seen logs put out on the side of a boom?

A. Yes sir.

Q. The Nicomen boom.

Ans. Yes sir.

Q. It is frequently done, is it not?

Ans. No sir.

Q. Is not the Nicomen boom so arranged that they can be taken out that way?

Ans. Yes sir.

(Witness excused.)

443 Capt. G. A. WHITCOMB, called in rebuttal on the part of the plaintiff, after being first duly sworn, testified as follows:

Direct examination.

By Mr. WELSH:

Q. What is your name?

Ans. G. A. Whitcomb.

Q. Where do you reside?

Ans. Willapa river, Pacific county.

Q. How long have you resided in this county?

Ans. About forty-eight years.

Q. What is your business?
Ans. Steamboating mostly.
Q. You are a licensed pilot?
Ans. Yes sir.
Q. How long have you been engaged in steamboating on this bay, and on these rivers?
Ans. About twenty-five years.
Q. State what experience, if any, you have had in navigating North river.
Ans. I have been up and down North river a good many times.
Q. Describe the water craft that you have plied on that river.
Ans. I ran the steamer Flora Brown.
Q. How many feet of water did she draw?
Ans. About five feet.
Q. Did you ever run any other boat?
Ans. I ran the steamer South Bend.
Q. How many feet of water did the South Bend draw?
A. Seven feet, when loaded up.
Q. Now, Captain, state whether or not you are familiar with North river, as to the depth of the water.
Ans. Yes sir; I am.
Q. State to the court the conditions in that river respecting navigation.
444 Ans. From the mouth up?
Q. Yes.
Ans. Well, as far as I have been up with a steamer was to the old settlers' boom.
Q. Describe the right side of the river and the left side, with respect to the depth of water.
Ans. Well, the left hand side, going up, is the deep water.
Q. Is the deeper water on the left, going up?
A. Yes sir.
Q. From your experience as a licensed pilot, and from the experience that you have had in navigating the North river, state whether or not it would be possible at low tide to navigate North river along the right bank of the river coming down, as it closed with the boom structure in the neighborhood of Smith's slough, and below the old settlers' boom?
Ans. At low water?
Q. Yes.
Ans. No sir. The right hand side coming down is the channel.
Q. You mean that on the right hand side coming down is where the channel is?
Ans. Yes sir.
Q. Do you know where Smith's slough is on that river?
A. Yes sir.
Q. State whether or not there are any bars on the opposite side of it?
Ans. There is just at the mouth of it.
Q. How far across the river does that bar extend.
A. It runs about half way across it, somewheres along there.

Q. Which side of the river is the bar on?
Ans. On the right hand coming down is the bar, just above the slough.
Q. Which do you mean going up or down?
Ans. On the right hand going up; yes sir.

445 Cross-examination.

By Mr. ADEL:

Q. Are you running a boat now, Captain?
Ans. No, not just now, I am not.
Q. When did you quit?
Ans. A year ago.
Q. Have you been up the river since then?
Ans. I was up today.
Q. You always had to consult the tide in navigating North river, did you not?
Ans. Yes, down at the lower part of it you do.
Q. And the upper part is not navigable for vessels at all?
Ans. Well, yes, any time that you can go up above Hawk's Point; you could go up to the old boom. Hawk's Point is below the cannery.
Q. It is a mile or two below, is it not?
A. Yes, sir.
Q. That is the shallowest place in the river for some miles up?
Ans. Yes, sir.
Q. It is shallower than the bar at Smith's slough?
A. No, I think they are both about the same, the slough and Hawk's Point bar.
Q. You would go up on a high tide and you would try to come down on a high tide?
Ans. No, sir.
Q. You would not wait for low tide?
Ans. I have been up there and come out on a low tide; that is, on quite a low tide.
Q. Could you go up the river on a low tide?
Ans. Yes, sir.
Q. Could you cross Hawk's Point bar at low tide?
A. Yes, mean low tide,—a common low tide.
Q. It takes an extraordinary run out, does it, to hinder navigation?
Ans. Yes, sir.
446 Q. With what size vessel?
Ans. Well, a boat drawing——

(Witness excused.)

W. B. HEWEN, being called by the plaintiff in rebuttal, after being first duly sworn, testified as follows:

Direct examination.

By Mr. GUDGELL:

Mr. ABEL: I think we have omitted an exhibit—a deed to part of our shore right, a deed from Mr. Don L. Smith.

COURT: Very well, same admitted as defendant's exhibit 12.

Q. You are now, and have been for a number of years practicing attorney at this bar?

Ans. Yes, sir.

Q. I will ask you if during the years 1899 and 1900 you were a member of the firm of Hewen & Stratton?

A. Yes, sir.

Q. You are now counsel for the defendant in this case.

Q. I will ask you if, during the year 1900, you made application to the United States government for permission to construct the Nicomen boom?

Mr. ABEL: That is objected to as not being proper rebuttal, and as being incompetent.

COURT: I don't see that there is any rebuttal in that.

MR. WELSH: Is is for the object of showing the notice to one party, or one member, as being noted to all.

COURT: It seems that your plat was filed with the secretary of war, or the secretary of state.

Mr. WELSH: We will make an offer, and then ask for the
447 ruling of the court. We now offer to prove by Mr. Hewen that during the years 1899 and 1900, that he was a practicing attorney at law, and he was a member of the firm of Hewen & Stratton, which firm was a copartnership, consisting of himself and W. B. Stratton. That the said firm of Hewen & Stratton drew the articles of incorporation for the plaintiff company, and secured for the plaintiff company permission from the war department to construct its boom in North river, and also filed with the secretary of state, for the plaintiff company, its plat, showing the lands and waters which said company purported to use for boom purposes, and that now he is an attorney of record for this, the defendant company.

Mr. ABEL: To which offer we object.

COURT: The objection will be sustained on the ground that the testimony is immaterial.

(Exception taken.)

Q. Since the commencement of this action have you made application to the war department to construct a boom in North river?

Ans. No, sir.

(Objected to as being incompetent, irrelevant and immaterial.)

COURT: The question has been answered.

(Witness excused.)

Mr. STRATTON: It is stipulated by the parties to this action, that the plaintiff may file certified copies of deeds, of any deeds
448 that it may see fit to file, and that the same shall be considered as produced in evidence, subject to objection, to the same and each of them as being incompetent, irrelevant and immaterial.

Mr. ABEL: We would suggest that said deeds relate to the lands mentioned in the deeds previously offered.

Mr. WELSH: We now file a certified copy of the remonstrance, and ask that the same be marked as an exhibit.

The COURT: It is admitted in evidence as plaintiff's exhibit N.

COURT: Let the record show that either party may file in the office of the county auditor if they desire, any deeds, and that they may file them of this date, before a decision is rendered in the case.

449 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM COMPANY, a Corporation, Plaintiff,
vs.
NORTH SHORE BOOM AND DRIVING COMPANY, Defendant.

Direct examination.

W. J. JOHNSON, one of the witnesses for the defendant in the above entitled cause, being first duly sworn testified as follows:

Q. Your residence, Mr. Johnson?
A. North river.
Q. How long have you lived on North river?
A. Three years.
Q. How many settlers are there upon North river below the falls, how many families?
A. There is only two.
Q. Above the falls within a mile or two?
A. There is two more.
Q. I suppose your method of getting to South Bend and Willapa Harbor is by North river, is it?
A. Yes.
Q. What is the practice with respect to the tide, as to when you travel up and down the river?
A. We generally start on the ebb from home.
450 Q. And returning?
A. Try to get on the flood tide back.
Q. What can you say as to the navigability of the lower part of North river, particularly that part in dispute here on ordinary water, on half tide?
A. I can go up any time of tide, that is with a small boat.
Q. What can you say as to the——

(By the COURT:)

Q. How did you generally go up and down?
A. In a small boat.

(By the COURT:)

Q. Row boat?
A. Yes.
Q. At low tide how is it?
A. Going up?
Q. Yes, or coming down?
A. Always come down at low tide and go up when it floods.
Q. Is there any difference traveling up the river when the tide is low?
A. Certainly, you would have to pull harder.
Q. What about the strength of the current?
A. You have the strength of the current to pull against.

(By the COURT:)

Q. With respect to the depth of water?
A. I never was bothered for depth of water with a small boat.
Q. Did you have any difficulty either before the boom was built or since?
A. No.

451 Cross-examination.

Q. Did you above the boom?
A. Yes, there is riffles above the boom.
Q. Did you alongside the boom?
A. No, sir.
A. I haven't but two or three times and none of these times at low water.
Q. Are you in the employ of the defendant company?
A. No, sir.
Q. Have you been?
A. Not for a year.
Q. I mean the new boom company?
A. No, sir.
Q. The reason why you start from home on the ebb and go back on the flood is to save rowing, is it not?
A. Yes.
Q. Haven't you been cutting boom sticks for this company?
A. Yes, been working for Don. Smith this summer.
Q. While Don. Smith was getting out boom sticks for the new company?
A. Yes.

Witness excused.

452 In the Superior Court of the State of Washington in and for Pacific County.

No. 1501.

NICOMEN BOOM COMPANY, Plaintiff,
vs.
NORTH SHORE BOOM AND DRIVING CO., Defendant.

Opinion.

This action is the outgrowth of a controversy between two boom companies, as to their rights under the laws of the state relative to corporations of that character. When the action was commenced the plaintiff was granted by the court commissioner of Pacific county en *ex-parte* order temporarily restraining the defendant from prosecuting the work of which the plaintiff complained. The matter was next heard by the superior court of Pacific county upon an application of the plaintiff for a temporary injunction, based upon the same complaint. Numerous affidavits were submitted to the court in behalf of the respective parties and the court thereupon granted the prayer of the plaintiff for a temporary injunction, pending a final hearing, the same to become effective upon the filing by the plaintiff of an indemnity bond in the sum of $3000.00. It appears from the record that the only bond ever furnished by the plaintiff was a bond in the sum of $500.00, filed by it pursuant to the temporary restraining order. By reason of the failure of the plaintiff to file a further bond, the defendant contended that the temporary restraining order was no longer in force, and that it had the right to proceed, notwithstanding the temporary injunc-
453 tion, until the bond provided for thereby was furnished by the plaintiff. Acting upon this contention, it resumed, a few days after the temporary injunction was issued, the work upon which it was engaged, when action was commenced.

At the final hearing before this court a supplemental complaint was filed setting forth that since the action was begun the defendant had completed the work sought to be enjoined, and alleging that the business of the plaintiff could not be pursued in consequence thereof and praying for a mandatory injunction requiring the defendant to take up and remove the structures so erected.

The answer of the defendant to the supplemental complaint denies every statement therein except that it admits that it has nearly completed its proposed improvements and will soon have the same fully completed.

The question raised by the pleadings and the proof call for a construction of the laws of the state relative to boom companies. These laws are found in the statutes of 1890 and 1895. The act of 1895 is broader than the earlier statute, in that it empowers boom companies, incorporated for such purposes, to clear out and improve

rivers and streams in this state and to drive, sort, hold and deliver logs and other timber products thereon. The act of 1890 simply authorizes the organization of corporations "for the purpose of catching booming, sorting, rafting and holding logs, lumber and other timber products." The two acts are substantially the same in other respects, at least in so far as the questions now before the court are concerned. The parties to this action were each incorporated after the act of 1895 became effective, but the objects specified in
454 their articles of incorporation are not equally extensive.

The plaintiff corporation does not claim by its articles to have been organized for the purpose of the clearing out and improvement of rivers and streams *of* the driving of timber products thereon, but the objects set out in the articles are limited to those specified in the act of 1890. The defendant corporation embraces in its articles all of the objects specified in both of the statutes.

The statutes require alike that every corporation organized for the purposes mentioned therein must within "ninety days after its articles of incorporation have been filed, proceed to file in the office of the secretary of state a plat or survey of so much of the shore lines of the waters of the state and lands contiguous thereto as are proposed to be appropriated for said purpose of said corporation." (2 Bal. Sec. 4379.)

Both the plaintiff and the defendant seasonably filed with the secretary of state the plats thereby required, the territory now in litigation being within the limits of each of the plats.

The plaintiff before beginning any work also submitted to the secretary of war, the plan of its proposed improvements and a plat of the territory to be occupied thereby and was granted a permit by the war department to construct the boom within the limits of the whole territory covered by this litigation. The defendant company also submitted to the war department a somewhat
455 indefinite and informal plat of its proposed improvements in the river and claims to have been authorized by the department to proceed therewith, which claim is disputed by the plaintiff. The proof on the subject is not clear but in my opinion that question is immaterial in passing upon the rights here involved. The laws of the state do not require such a permit to be obtained and the application to the war department is only made for the purpose of satisfying it that the interests of navigation will not be prejudiced by the proposed improvements. I think a boom company organized under the laws of the state could erect its works in the river without reference to the war department, provided the navigability of the river was not unreasonably obstructed thereby.

The territory designated by the plat of the plaintiff embraces the shores of North river, extending from near the mouth of the river on both sides for a distance of about — miles up the stream. The plaintiff thereupon acquired such upland and shore land on the left hand side of the river (reckoning down the stream) as was necessary for use in the premises, and promptly proceeded to erect boom works along the left side of the river as far as it cared

to operate at the time, but stopping far short of the upper end of the territory covered by its plat of location. The boom consists of a succession of "dolphins," the same being a cluster of piles driven near the middle of the stream and securely bound together—the clusters being about forty feet apart. Boom sticks are extended along the row of dolphins on each side thereof to prevent the escape of logs entering the boom. A short distance above the last dolphin at the upper end of the constructed works, a sheer boom,
456 known as a "rudder boom" is maintained by the plaintiff. It is movable and is anchored to the shore on the opposite side of the river from the row of dolphins, and is so constructed as to intercept all logs coming down the river on that side and shunt them into the boom on the opposite shore. There is a gap between the end of the rudder sheer and the nearest dolphin below sufficient for the passage of water craft. The boom of plaintiff as so constructed has been constantly operated from the time it was erected. While plaintiff has never actually extended this boom beyond the rudder sheer, which is a mile or more below the upper end of its located territory, it always expected to extend the boom at some indefinite time, as business demands might require. Several weeks before this suit was brought, the plaintiff had ordered piling for the purpose of extending this boom about 1000 feet further up the river.

It is established by the evidence that large quantities of timber yet remain to be cut and removed from the upper shores of North river, which necessarily must be floated down the stream in order to be rafted and marketed, and that the output for the ensuing year is estimated to be far in excess of any previous season. There is no proof that the plaintiff company had entered into actual contracts with the owners of this timber for catching and rafting the same. The plaintiff relies upon the statutes for the privilege of handling these logs, free from any interruption by the defendant. The works of the plaintiff were constructed at a cost of about $16000.00, and the profits to be realized from the further operation of its boom are estimated at a very large amount.

The defendant was incorporated under the boom laws on the 27th day of August, 1903; the articles of the plaintiff having been
457 filed on the 5th day of April, 1900. The plat of location filed by the defendant in the office of the secretary of state pursuant to the statute covered substantially the part of the territory embraced in the plat of the plaintiff, lying above the upper end of the boom constructed by the plaintiff. The defendant thereupon proceeded to acquire the upland and tide lands within its plat of location on the right hand side of the river considered necessary for its use, these lands being on the bank opposite to the side of the river occupied by the boom of plaintiff. No question is raised as to the interference by the defendant with the rights of the owners of any upland or tide land lying on the right hand side of the river. Shortly after the incorporation of defendant, it began to construct a line of dolphins within the limits of both plats and beginning at a point on the right hand side of the river, near the center thereof, and several hundred feet above the rudder sheer of the plaintiff. Work

was begun on the 3rd day of September, 1903. Up to that time no structures of any sort had been erected by plaintiff within the limits of the territory so located and occupied by the defendant, nor was any part of this disputed territory in the actual occupation of the plaintiff. Both plaintiff and defendant had been for some weeks past preparing to extend their booms within this territory, but as far as the evidence shows, each was ignorant of the plans of the other until work was actually begun by the defendant. When this work was begun plaintiff instituted the present action, the course of which has already been detailed. The plaintiff also began work on the extension of its old boom a few days after defendant began work, but since the temporary injunction was issued has not prosecuted this work. The plaintiff claims that it would have begun the
458 extension of the boom several weeks earlier, and before it knew of such intention of the defendant, but for unavoidable delay in securing the necessary supplies, and I have no doubt that plaintiff expected to extend its boom for a distance of 1000 feet before it learned of the plans of the defendant. Since the action was begun, defendant has substantially completed its proposed boom. The construction of the two booms is practically the same except with regard to the sheer boom. The sheer boom of the plaintiff as already stated, is a rudder sheer, while the sheer of the defendant at the upper end of its works consists of a stationary dolphin erected above the line of the dolphins constituting the main boom, and on the opposite side of the river therefrom, about 15 feet from the bank. There is a gap between this sheer boom and the upper dolphin of the main boom sufficiently wide for the passage of water craft. The purpose of this sheer boom is to intercept logs coming down the river on the left hand side, being the side occupied by the boom of plaintiff. It is proposed to effect this result by connecting the sheer boom with the upper dolphin of the main boom through the agency of a boom stick. The logs coming down the river on the left hand side would thereby be shunted into the mouth of the main boom of defendant. It is very clear and seems to be conceded that both of the booms cannot be constructed as proposed. If the boom of the plaintiff should be extended up the river the passage between its line of dolphins and the dolphins of defendant on the other side of the stream would be so narrow as to block navigation, nor would it be practicable to operate both of the booms under such conditions. Such being the case, if the defendant company is permitted to operate the boom so constructed by it, the boom of the plaintiff would only receive such timber product from up the river as might escape the boom of the defendant, or might be transmitted through that boom to the
459 plaintiff. The passage of logs through the boom would interfere with the business of the defendant to the extent of the delay caused thereby. There was testimony to the effect that in the ordinary operation of the boom, the logs caught at the mouth thereof are not passed out of the boom until the lower extremity is reached, and that in such case a delay of several weeks or months might be entailed. There is also evidence tending to show that logs might be taken out of the boom anywhere by removing the boom sticks

between the dolphins and that by such a course the delay of transmission would be comparatively short. But whether on not any embarrassment to the business of the plaintiff, whatever it may be, can be considered by the court depends upon the rights of the respective parties under the statutes. It now remains for the court to determine as to the nature and extent of these rights.

It is contended by the plaintiff in the first instance that by virtue of the prior filing of its plat of location, it acquired an exclusive right to operate a boom business on both sides of the river within the limits of the plat, for the period of its corporate existence, and that under the law it could extend the original boom at any time within such period, or, in any event, within a reasonable period.

It is to be observed that the statute does not in terms grant any exclusive privilege. The plaintiff was simply authorized thereby to file a plat of the waters of the state and lands contiguous thereto "as are proposed to be appropriated." The filing of the plat was not in itself an appropriation of the property rights in question. It was only a condition precedent to the exercise of the right to appropriate. An actual appropriation was still necessary before the
460 plaintiff could enjoy any of the rights granted by the franchise. The right to use the lands contiguous to the shore could only be acquired by the purchase or condemnation thereof. The statute simply granted to the plaintiff the prior right to acquire the same. That right was necessarily exclusive to a limited extent. The boom company would gain nothing by the statute, if after making a survey and filing the plat required thereby, and before a reasonable opportunity for taking actual possession, another company should be permitted to exercise the right of appropriation. But I do not think the statute intended to grant an exclusive right of appropriation for an indefinite period or for unlimited territory. As a matter of public policy, monopolies are not favored by the law. The constitution expressly limits the powers of the legislature in that regard. It has become an established rule that public grants susceptible of two constructions must receive the one most favorable to the public.

(Water Co. *vs.* Tacoma—21 Wash. 530.)
(Gas Co. *vs.* Hamilton City—146 U. S. 258.)

When a corporation accepts a franchise, ir does so in the light of this rule, and cannot complain if the value of the franchise is lessened by ligitimate competition. The plaintiff can only assert the rights which became vested in it by virtue of the statute. While the statute does not in terms limit the area that may be covered by the plat, yet the liberal rule of construction applied in favor of the public must always be had in mind. It is very evident that the legislature did not intend to grant any corporation exclusive right to boom logs throughout the entire course of a river, at least in advance of the actual occupation of the territory for such purpose. Otherwise one of the great industries of the state might

be throttled indefinitely by the mere filing of a plat of
461 location. A boom company must not ony "propose to appropriate," but the actual appropriation must follow within a reasonable period. It is established by the evidence that more than three years had elapsed since the incorporation of plaintiff before it attempted to take actual possession of the territory in question. For three years it had been satisfied to occupy only a limited area of the territory covered by its plat and had not definitely planned for any extension of the original boom until at least a few weeks before suit was begun. I do not think the right to construct a boom should be indefinitely impounded at the pleasure of a corporation. If the mere intent to extend the boom as the business interests of a corporation might require, vested in the company an unlimited right to extend—for all practicable purposes, an absolute monopoly would be permitted. If the boom company could not be compelled to extend until it felt warranted in so doing by business conditions, the real character of the conditions would be left to the sole decision of the company. Other corporations might be desirous of engaging in the same enterprise to the advantage of the public interests, and yet the latent intent of the first locator would be a perpetual bar to the improvements. As a result the company first filing a plat could not be required to extend its boom, nor would any other company desiring to occupy the territory be permitted to do so. I do not think such a situation was contemplated by the statute. The statute plainly provides for the location of more than one boom on the same river.

(1 Bal. Sec. 4382.)

Under the construction contended for by plaintiff, it would
462 not be possible, where the first plat covered the whole available territory, to give effect to that salutary provision. It is significant also that the statutes of 1890 and 1895 alike provide that any property acquired by boom companies under condemnation proceedings shall revert to the original owner when the use of the property shall cease for a period of one year.

(1 Bal. Secs. 4378-4388.)

The act of 1890 only provides for such reversion in case the owner repays the original cost of condemnation, but the act of 1895 is unconditional in that respect. It seems clear that the legislature intended to limit the right of occupation to actual use. Certainly, in case of such reversion under the statute, it should be in the power of some other boom company to appropriate the forfeited territory for boom purposes. If the mere filing of a plat covering this territory gives to the boom company exclusive right to occupy it for the period of its corporate existence, or for any period after one year from the time of abandonment, the forfeiture clause of the statute could not be given effect. After such a forfeiture the delinquent company could no lower occupy the released property. Yet, under the logic of plaintiff, notwithstanding the loss of this right, no other boom company could exercise the privi-

lege of appropriating the same territory, in as much as it was covered by the plat of prior location. This *reductio ad absurdum* would seem to demonstrate the fallacy of such reasoning.

But plaintiff urges that under a decision of the supreme court in the case of (Boom Co. *vs.* Chehalis Co.—24 Wash. 137), its franchise is property subject to taxation and hence that it had acquired a vested right under the plat. A franchise subject to such taxation however consists only of the rights actually enjoyed
463 by the corporation, which, in this case, would not cover any right to occupy the territory of which it had failed to take seasonable possession.

I am therefore constrained to hold that since no part of the territory here in dispute was occupied by the boom of the plaintiff at any time within a period of three years prior to the commencement of the action, the plaintiff no longer had a prior right of appropriation. Consequently the defendant company was permitted under the law to embrace this territory in its plat, and to improve the same for boom purposes, in so far as any exclusive right of the plaintiff is concerned by virtue of the prior plat.

But plaintiff, as the owner of certain upland and tide lands on the left bank of the river adjacent to the disputed territory, contends that the works of the defendant infringe upon the riparian rights appurtenant to these lands, and that hence the application for a mandatory injunction should be granted.

It does not appear that plaintiff has erected any improvements on any part of these lands or that the works of defendant are constructed anywhere within the boundaries thereof. The only complaint is in this regard, that the structures of the defendant are obstructions that render these lands less accessible from the river. But under the uniform decisions of our supreme court I am compelled to hold that the ownership of lands bordering on a navigable stream does not vest in the proprietor any special right to the waters beyond the boundaries thereof, and that his interest in such waters is simply such as is common to the public. It was held in the case of Isenbach *vs.* Hatfield, 2 Wash. 253, that "riparian proprietors on the shore of the navigable waters of the state
464 have no special or peculiar rights therein as an incident of their estate." (*Vide* also Cohn *vs.* Boom Co. N. W. R. 486.) I am unable to see from the evidence in any event, that the accessibility of these lands is substantially impaired by the structures of the defendant. The line of dolphins constituting the main boom of the defendant is constructed on the other side of the river. The sheer boom, or single stationary dolphin, of the defendant does not touch any land owned by the plaintiff, but is driven in running water at least 15 feet distant from the nearest shore. It also appears from the evidence that there is sufficient space and depth of water between this sheer boom and the shore to permit the passage of such water craft as usually ply on the river. The claim of the plaintiff as to riparian rights in the premises

cannot be regarded therefore as any ground for the issuing of an injunction.

It is strenuously urged by the plaintiff, however that the boom laws expressly provide that "such boom or booms, sheer booms and receiving booms shall be so constructed as to allow the free passage between any such booms and the opposite shore for all boats, vessels or steam craft of any kind whatsoever, or for ordinary purposes of navigation. (1 Bal. Sec. 4380.) It is contended that the structures of the defendant fall within the prohibition of this statute and that hence they should be removed.

Without taking up the question as to the right of plaintiff to apply for the abatement of any nuisance that is common to the public, the facts in this case, in my opinion, do not show any disregard of this statute by the defendant. It is undoubtedly true that North river is a meandered and navigable stream, both above and below the lines of the disputed territory. The tide rises and falls for the distance of a mile or more above the uppermost end thereof. But the portion of the river above the boom of defendant is not navigable in the ordinary sense at low tide. The
465 navigability of the river is occasioned chiefly by the flooding of the tide. In the dry season the portion of the river not affected by the tide is not navigable within the contemplation of the law. In such seasons logs cannot be floated down that part of the stream. They can only be brought to tide water through the swelling of the stream, caused by occasional freshets. While the river is navigable at ordinary high tide, within the tidal section, by such vessels as ordinarily have occasion to ply thereon, yet as a matter of fact, the chief use of the river is for the floating of logs cut from the upper shores. Not more than a dozen settlers live along the banks of the river, and their customary transportation is furnished by canoes and row-boats. The boom of the defendant does not interfere with the free passage between the boom and the opposite shore of such water craft as could at any time go up the stream from the mouth of the river. There is a bar near the mouth of the river opposite Hawks Point, which at low tide cannot be crossed by vessels of any considerable draught. It appears from the evidence that such vessels as are able to cross this bar can always proceed up the river beyond the further end of the territory in dispute, notwithstanding the boom of defendant. I find that this boom is an obstruction to navigation only in the sense that it occupies a portion of the river that otherwise would be navigable, and that sufficient room is left in the river on the outside of this boom for the passage of such vessels as operate on the river. I do not think that the mere use of navigable waters under the circumstances of this case, is any interference with the laws of navigation. Public streams are public highways, intended for the various public uses to which they may be put, consistent with the reasonable use thereof for the purposes of navigation. It has been held
466 by our highest courts that "in order to develop the greater utility of many rivers, it is often essential that such structures

as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges; but to the legislature of the state may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter." (Boom Co. *vs.* Neeson—20 Wash. 147—and Pound *vs.* Turck—95 U. S. 459.)

It is contended by the plaintiff that under the statutes in question, the defendant company would have no right to catch or detain any logs floating in the river that might be consigned to the boom of plaintiff. Reliance is had on the provisions of sections 4361 and 4382 of 1 Bal. Code. The first of these sections defines the right of boom companies with respect to the handling of logs which the owners thereof cause to be floated down the river. Distinction is made in this regard between a boom company operating at the mouth of the river and one whose boom lies along the upper shores. A company operating at the mouth of the river is permitted and required to catch, hold assort, boom and raft all logs and timber products, except such as may be already in charge of its owners, and shall have the right to charge and collect tolls for such service." A company operating a boom not at the mouth of the river is permitted "to catch, hold and assort logs and timber products of all persons requesting such service. * * * It is provided by the second of said sections that in case more than one boom is located on or in the same river or its tributaries, the corporation
467 owning the upper boom or works shall pass, free or charge, all saw logs or other timber product consigned to the lower boom or booms. It will be seen that the statute does not anywhere prohibit in express terms the catching or temporary holding by the company operating the upper boom of any logs that may float therein. It simply provides that in the case of logs not consigned to the lower boom, an upper company shall not charge the owner or owners thereof for any service in catching or assorting the same unless this is done at the request of such owner or owners; that in case of logs consigned to the lower boom or booms, the same shall be passed by the upper company free of charge.

Two cases are cited by counsel for plaintiff in support of their contention in this particular, the same being West Branch *vs.* Dodge, 31 Pa. State, 285 and Mason *vs.* Boom Co. 16 Fed. cases, 9232. It will be seen from an examination of these cases that the statutes granting the charter to the boom company concerned, in express terms prohibited such company from detaining any logs unless at the request of the owner or owners thereof. Both of these cases arose in the State of Pennsylvania, one of them being determined in the federal and the other in the state court. But the later case has been expressly overruled in the more recent suit of West Branch Boom Co. *vs.* Lumber Co., reported in 121 Pa. State, page 143, and also in 6 Am. State Reports, page 766. It appears from that decision that the statute under consideration expressly provided "that

no lumber of any description shall be stopped, except upon the written request of the owner or owners of the same," also that a free and unobstructed passage shall at all times be kept open so that the navigation of the river shall be as free as it now is." The plaintiff company in that case brought an action to recover damages for
468 the detention of logs in the boom of defendant and for the resulting deterioration in their value. As stated by the court in that decision: "Plaintiff's contention is that as their logs were destined to points below the Lock Haven Boom and due and proper notice of that fact had been given as required by the act of May 8th, 1854, the defendant had no right to stop them for any length of time in their boom under any circumstances or for any purpose; and that, having done so in the years 1883 and 1884, they are answerable in damages for the loss occasioned thereby. The defendants maintain however, that this construction of their charter would give it no practical effect whatever; that the several provisos mentioned, if so constructed, are totally repugnant to the body of the act of incorporation and would wholly defeat the public purpose which the legislature manifestly had in view in its enactment. Their contention is, therefore, that the saving clauses should receive such a reasonable construction as would not practically nullify their charter; * * * that some of the logs were in fact, destined for Lock Haven, and some for Williamsport, but that the marks could not be seen, nor their destination determined; that in order to secure the logs consigned to their custody, the West Branch Boom Company thereupon opened their boom, and received into it the mass of logs without distinction, until their boom was filled, and suffered the residue to pass down the stream; that as soon as practicable, and with the utmost diligence and dispatch, they passed out of their boom all the plaintiff's logs, and all other logs destined for points below Lock Haven; that they used every appliance and means, expended large sums of money, employed a great many men, and did everything in their power, or that it was possible to do by
469 human ingenuity and skill, to deliver the logs of the plaintiff below their booms, so that they could be driven into the Susquehanna boom; that the marks are on the ends of the logs, and it is impossible to ascertain to whom the logs belong until the marks can be seen, and that can only be done when the boom is opened and the logs passed out. * * * These cases show conclusively that we are not to adhere to a literal construction of this charter, if by so doing we defeat the public purpose to be subserved thereby; the provisos are to be construed so as not to defeat the grant itself. * * * The right to use a shear boom and to stop their own logs driven indescriminately with the logs of others, assumes the right, under the circumstances stated in the offer, to stop the mixed mass of logs for the shortest time reasonably necessary, by the use of utmost diligence and skill, to withdraw from that mass their own logs. To decide otherwise, would be to defeat the very purpose which the legislature had in view."

The same principle was upheld in the Michigan case of Buchanan *vs.* Logging Co., decided by Judge Cooley, reported in 12 N. W.

Reporter, 491, the same being an injunction suit praying that defendant be enjoined from holding the water of Flat river by means of dams and jams of logs. Complainants were the owners of a mill site and their power was obtained by a dam erected and maintained by them. It was alleged that the holding back of the water by defendant injured the water power, and that the letting of it loose both injured the water power and injured and endangered the mill. That distinguished jurist observed, "It is manifest from this statement of the issue that the question before the court is one of the reasonable use by the parties respectively of the waters of Flat river.

Complainants have a right to make use of them for milling
470 purposes, and their case is that defendants unreasonably interfere with the enjoyment of this right. Defendants have a right in common with the whole public to make use of the waters for floating logs, and they claim that they assert and enjoy this right in a careful and prudent manner, and with no unnecessary interference with the rights of any one. The questions presented—at least on this branch of the case—are therefore purely questions of fact, each right modifies the other and may perhaps render it less valuable, but this fact, if the enjoyment of the right is in itself reasonable and considerate, can furnish no ground for complaint. * * * But rights thus related it is exceedingly difficult to protect by injunction without incurring the danger of causing more mischief than the writ could prevent. The decree awarding an injunction could not well go beyond laying down general principles; and these would be merely declaratory of rules of law which nobody disputes and which both parties profess to accept and obey. Defendant is entitled to use the stream for its purposes, and flooding may at times be perfectly reasonable and lawful. * * * Where specific acts can be forbidden, an injunction may be proper; but when the questions from their nature must be perpetually recurring, and are only questions of what is reasonable in view of the special facts, it is seldom that an attempt to preclude the violation of right by issuing a mandatory writ can be of any avail. * * * The remedy at law is far better adapted to the case than any which can be afforded in equity, and they must be left to pursue it."

The Michigan case of Watts *vs.* Tittabawassee Boom Co., reported in 17 N. W. Reporter, 809, was an action for damages for the detention by the defendant of logs belonging to plaintiff. As stated

in the opinion: "It is the business of defendant to take the
471 promiscuous mass of logs, float them down the Tittabawassee, and at the boom separate and put them into rafts, and in that condition deliver them to their respective owners along the Saginaw river or at the mills. The defendant has no control over the amount of logs to be put in the river nor the manner of putting them in. * * * We think that the proofs clearly show that the logs could not be safely handled without placing them into rafts on the Tittabawassee river. When stopped the logs form into a jam or dense mass, piled one upon another, from bank to bank, so that a raft of timber above or in the jam cannot be moved any faster than the mass of logs, until those below have been displaced or car-

ried down the stream. The evidence shows the plaintiffs' timber rafts were run down into the jams which formed above the pier boom and Bryant trip, and were then delayed, and were moved no faster than the logs forming the jam. No other obstructions are complained of. It is claimed by the defendants that the testimony tends to show that whenever rafts reached the boom or trip they were permitted to pass with as little delay as possible." Commenting on this state of facts, the court observed, "Under its charter defendant has the power and right, on the stream where it may lawfully do business, to construct, use, and maintain all necessary booms for its business, provided that such booms shall be so constructed and, so far as practicable, used so as to allow the free passage of boats, vessels, logs and other floatables along such waters. The location, extent, manner of construction, and number, is left to the determination of the defendant, subject only to the restrictions mentioned. Any person has a right to use the stream to the extent he may choose, provided he does not encroach upon the rights of any other person to do the same thing. * * * It has always been proper
472 to stop a mass of logs in a river for the purpose of securing the rights of several owners of the same, or to prevent their loss or destruction. Of course when this is done on the small streams, navigation is of necessity for the time being impeded. The only question which can arise in such cases is whether the stoppage of the logs was done in a reasonably prudent manner, and was continued no longer than was necessary to accomplish the object. If there has been want of care and diligence, or any neglect on the part of the company either in doing the business or in constructing the booms, and damage ensued, then it will be liable for the injury of damage which is the immediate and necessary consequence of such want of care and diligence, negligence or wrong."

In the Wisconsin case, Edwards *vs.* Wausau Boom Co., reported in 30 N. W. Reporter, 720, the plaintiff sought to recover damages for the detention of his logs by the boom of the defendant, alleging that defendant neglected and refused to let his logs through his boom. The trial court instructed the jury that the defendant company must take care, "that it does not materially interfere with the superior right of all the people to navigate the river." The appellate court reversed the judgment on the ground "that the jury may have received the impression that the river, at that point must not be closed, even against the plaintiffs, so as to prevent them from running their logs down the river without obstruction, or so that any one might navigate the river at that point with boats, vessels, barges and rafts. The legislature gave the company the right to construct their piers and booms with a view of assorting, dividing and
473 storing logs running loose or in drives in the river above that point, in view of the condition of the river at and above that point. The complaint states that the evidence shows, that the river was not navigable above that point for anything but running logs in this way. To make it practicably navigable for even such purpose alone, booming works for stopping, holding and assorting logs, so running free in the river were absolutely necessary. The works

therefore, may be constructed without any reference to any other navigability of the river, and the river may be—indeed, must be—entirely closed, so as to prevent the unobstructed passage of such logs."

In the Minnesota case of Osborne *vs.* Boom Co., 50 Am. Reports, 594 the plaintiff demanded that the defendant be restrained from hindering, stopping or delaying the plaintiffs logs down the St. Louis river; and that they be required to remove the piers and other structures erected by them in the river, so as to give a free and unobstructed passage to the plaintiffs logs, or that they be required so to alter their works as to enable them to separate from plaintiffs logs, such as are to stop at Knife Falls, and allow plaintiffs logs to pass on whenever and while the water in the river is sufficient to take them over the rapids and before it becomes too low for that purpose, and so as not to delay the plaintiff- in getting their logs to Duluth over said rapids, or to increase the expense thereof.

The court found it to be a fact that "It is not practicable to construct and operate any booms or assorting works on the St. Louis river within the limits mentioned, through which any considerable quantity of logs can be passed—and assorted as they pass—without material hindrance and delay to logs destined to points below
474 such limits, and if logs have to be scaled during their passage through the works, the hindrance and delay must be greater. No boom or other obstruction in the St. Louis river, within the limits mentioned, can be of any aid, service, or assistance to the plaintiffs, or others, who desire to run their logs, to any point below such limits; but such boom or other obstruction will, under any and all ordinary circumstances, operate as a detriment so far as they delay logs in reaching their destination, and such delay is likely to be serious and considerable because logs will usually reach such works in high water, which seldom lasts in the St. Louis for more than one to three weeks, and if logs are detained in the booms until a falling stage of water occurs, they may not pass over the rapids until another rise, and a rise does not ordinarily occur more than twice a year." The court observed under the state of facts that "the right to float logs in a stream of course implies the right to take them out; and when the logs of different owners, A, B, and C, are thus intermingled, there appears to be no practicable way for A to separate his from B and C, in order to take them out except by stopping the whole mass. If this cannot be done, then A's right of floatage is of little or no value. Yet A's right to use the common highway is equal to that of B or C, and if his interest requires that his logs should be taken out at a point above where B or C's interest requires that theirs should be taken out, respectively, he must have a reasonable right—that is to say, a right reasonable as between him and B and C and others using the river for like purposes. * * * In this conflict who is to determine how the right of floatage upon this common highway shall be enjoyed? Who is to fix upon the just and proper compromise of these conflicting interests? Obviously the legislature—
475 that department of government, which in the exercise of a law-making and a police power, prescribes the rules by which the use of public highways in general is regulated. * * *

It seems to me the cases above cited enunciate the principles that should govern in the decision of the case at bar. The legislature of our state has in plain terms provided for the operation of more than one boom on the same river. The proviso relating to the passage by the company operating the upper boom, free of charge, of the logs of owners who do not request the services of such company, and of logs that are consigned to the lower boom, should not be so construed as to nullify the franchise of the upper boom company. Neither the letter nor the spirit of our statutes call for such a construction. It would be idle to provide that logs should be passed "free of charge" unless it was contemplated that they might be transmitted through the boom of the upper company. In case they should not be passed through the boom, of course such company could not make a charge in any event. But if the statutes permit their passage through the boom, they should be construed by every reasonable intendment, to mean that such company may adopt methods of transmission that are practicable under the circumstances. Clearly the boom should be constructed and operated so as to permit the passage of logs witihout unreasonable delay. Whether or not the logs passing through the boom of defendant company should be considered as unreasonably detained would depend upon the conditions surrounding the particular occasion. This would be a question of fact to be determined by a jury, where damages for delay are sought; and by the court, where an injunction is applied for to restrain an unlawful detention. In the case at bar, no logs consigned to plaintiff have been actually detained by defendant, and there is no evidence before the court that the boom of defendant is so con-

476 structed as to necessitate such a delay, as, within the contemplation of the statute, must be regarded as unreasonable. It is unfortunate for the plaintiff that the boom of the defendant company has been constructed so as to hamper the business of the plaintiff, but had the plaintiff proceeded to make a seasonable appropriation of the disputed territory, this embarrassment would not have occurred. If I am correct in holding that by permitting a delay of three years to elapse, before attempting to take actual possession of this territory, the plaintiff lost the prior right to appropriate it, the defendant company had a right to make this appropriation, and consequently the incidental loss to the plaintiff could not be considered. The plaintiff was charged with knowledge of the law at the time its works were constructed, and cannot complain if another company, acting within its rights, has gained a substantial advantage as a business competitor.

I am therefore constrained to hold that judgment in this case should be for the defendant.

Let findings and a decree be prepared and entered in accordance with this opinion.

R. B. ALBERTSON, *Judge.*

477 Indorsed: #1501 Nicomen Boom Co. *vs.* North Shore Boom & D. Co. Opinion. This opinion was filed Jan. 18 1904. E. A. Seaborg, County Clerk.

478 The plaintiff Nicomen Boom Co. hereby refers to and makes a part of this, the foregoing statement of facts, each and all of the following exhibits, which were introduced in evidence at the trial of the above entitled action, and are now on file in said action, and in the office of the clerk of the above named court, and in the possession of the clerk of said court, as such clerk, towit:

Plaintiff's exhibits, A, B, C, D, E, F, G, H, I, J, K, L, M, and N, and each of them, and also the deposition of J. S. Brace, which was taken on behalf of plaintiff-, and read in evidence at the trial of said action, and which deposition is now on file in the office of the clerk of the above named court.

Also, defendant's exhibits, numbered, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and Eleven, and twelve, and also another exhibit introduced by defendant, and known as and designated as defendant's identification No. 1, it being a plat or map, and it is also designated on the said map or plat as Def's ex. 1, and the same is now on file in the office of the clerk of the above named court, and is in the possession of said clerk as such clerk of said court.

That all of the foregoing exhibits are on file with and in the possession of the clerk of said court.

W. B. STRATTON,
WELSH BROS., AND
WM. H. GUDGEL,
Attorneys for Plaintiff, Nicomen Boom Co.

Service of the within and foregoing statement of facts is hereby admitted and copy received this 31st day of May, 1904, at 20 minutes past 12 o'clock noon of said day, and after said statement of facts were filed and marked filed in the above entitled action by the clerk of the above named superior court.

W. H. ABEL,
H. W. B. HEWEN,
RICHARD W. RUFFIN,
Attorneys for Defendant, North Shore Boom & Driving Company.

479 In the Superior Court of the State of Wahington in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant.

Notice of Filing Statement of Facts.

To the above named defendant in the above entitled action, namely to, the North Shore Boom & Driving Company; and to H. W. B. Hewen, and W. H. Abel, and R. W. Ruffin, the attorneys for said defendant:

You and each of you are hereby notified that the foregoing statement of facts is the statement of facts which the plaintiff proposed,

and proposes and filed in the above entitled action, prior hereto, and prior to the service of this notice, and of the service of the foregoing attached statement of facts upon you, and that the same is plaintiff's proposed statement of facts.

Respectfully submitted,

W. B. STRATTON,
WELSH BROS., AND
WILLIAM H. GUDGEL,
Attorneys for Plaintiff, Nicomen Boom Co.

Service of the foregoing notice is hereby admitted this 31st day of May, 1904, at the hour of 12 o'clock and 20 minutes past noon of said day.

W. H. ABEL,
H. W. B. HEWEN,
RICHARD W. RUFFIN,
Attorneys for Defendant.

Filed May 31 1904 at 8:30 A. M.

E. A. SEABORG,
County Clerk.

480 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff and Appellant,
vs.
NORTH SHORE BOOM AND DRIVING COMPANY, Defendant and Respondent.

In the above entitled cause, at the time of the settlement of the statement of facts in said cause, the judge, namely, Hon. R. B. Albertson, who settled said statement of facts, made a part of the said statement of facts an opinion made and filed by said judge, in said cause, on the 18th day of Jan'y, 1904, a part of said statement of facts, over the objection of the plaintiff and appellant. To which action in making said opinion, a part of said statement of facts, plaintiff and appellant excepted and now excepts, and moves to strike the same from said statement of facts, which motion the judge overrules, and plaintiff and appellant excepts.

Dated August 16, 1904.

R. B. ALBERTSON, *Judge.*

Filed Aug. 16, 1904.

E. A. SEABORG,
County Clerk.

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481 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff and Appellant,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant and Respondent.

Certificate to Statement of Facts.

STATE OF WASHINGTON, *County of Pacific, ss:*

I, R. B. Albertson, Judge of the superior court of the state of Washington, for Pacific County, do hereby certify that I am the judge, before whom was tried the above entitled action in the superior court above named.

That on this 16th day of August 1904 at the hour of ten o'clock in the forenoon of said day at the court room of the above named superior court, before me the above entitled action came on for the settlement and certifying of the statement of facts, in said ation, and the court finds that on the 9th of August 1904, plaintiff and appellant in said action, duly served upon the defendant and respondent in the manner required by law a notice in writing of the time and place of the settlement of said statement of facts and that said notice was served in the time and in the manner and was in the form as required by law and said notice notified the defendant among other things that said statement of facts as filed and proposed by the said plaintiff and appellant, and the amendments proposed thereto by the defendant and respondent, would be presented to me at this time and place, for settlement of the statement of facts, and that the statement of facts would be settled and certified at this time and place by me.

W. B. Stratton, Welsh Bros. and Wm. H. Gudgel, appeared herein as attorneys for plaintiff and appellant and H. W. B. Hewen and W. H. Abel, as attorneys for defendant and respondent, and the
482 attorneys for said defendant objected to settling said statement of facts on the ground that it was now too late, and which said objection is overruled, and defendant excepts.

Whereupon I, then and there proceeded to and now do hereby settle the statement of facts in said action.

And I further certify: That the foregoing is the statement of facts and that the matters and proceedings in the said statement of facts are matters and proceedings occurring in the cause, and that the same are hereby made a part of the record therein.

And I further certify: That the foregoing statement of facts contains all of the material facts, matters and proceedings heretofore occurring in the cause, and not already a part of the record in said action; and I further certify: That said statement of facts contains all rulings, decisions, evidence, testimony, papers, exhibits, exceptions, and proceedings in said action, not already a part of the

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record in said action, and said statement of facts contains all of the evidence and testimony in said action.

And I further certify: That plaintiff's exhibits, A, B, C, D, E, F, G, H, I, J, K, L, M, and N and each of them are hereby attached to, and are hereby made a part of said statement of facts, and of the record herein, and also the deposition of J. S. Brace, is attached to said statement of facts and is hereby made a part of said statement of facts and that defendant's exhibits, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, are attached to said statement of facts, and are hereby made a part of said statement of facts and of the record herein.

Witness my hand this 16th day of August A. D. 1904.

R. B. ALBERTSON, *Judge.*

Service admitted Aug. 16, 1904.

H. W. B. HEWEN,
W. H. ABEL,
Attorneys for Respondent.

Indorsed: Filed Aug. 16, 1904. E. A. Seaborg, County Clerk.

483 & 484 In the Supreme Court of the State of Washington.

THE NICOMEN BOOM CO., Plaintiff and Appellant,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant and Respondent.

Stipulation Extending Time in which to File Briefs.

It is hereby stipulated and agreed by and between the above named parties, by their respective attorneys that the said plaintiff and appellant have 120 days from the date of filing of the notice of appeal in said cause, in which to serve and file its brief and that defendant and respondent have 60 days, after the service on it of plaintiff's and appellant's brief, in which to serve and file its brief.

Witness our hands, this 16th day of August, 1904.

W. B. STRATTON,
WELSH BROS., AND
WM. H. GUDGEL,
Attorneys for Plaintiff and Appellant.
H. W. B. HEWEN,
W. H. ABEL,
Attorneys for Defendant and Respondent.

Indorsed: Filed Aug. 16, 1904. E. A. Seaborg, County Clerk.

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485 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant.

Summons.

The State of Washington to the North Shore Boom & Driving Company, defendant:

You are hereby summoned and required to be and appear within twenty days after the service of this summons upon you, exclusive of the day of service, and defend the above entitled action in the court aforesaid, and answer the complaint of plaintiff and serve a copy of your answer upon the undersigned attorneys for plaintiff at their address below stated, and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, which will be filed in the office of the clerk of the above named court and copy of which said complaint is herewith served upon —.

Plaintiff hereby designates the above named court and Pacific County, Washington, as the place of trial of said action.

WELSH BROS.,
Plaintiff's Attorneys.

Office and Post-office address South Bend, Pacific County, Washington.

Filed, Sept. 16th, 1903.
E. A. SEABORG, *County Clerk.*
By M. H. CARMICHAEL, *Deputy.*

486 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant.

Complaint.

To the Honorable Judge of the Above Named Superior Court:

Comes now the plaintiff in the above entitled action and complains of the above named defendant and for cause of action and complaint, alleges:

1.

That the plaintiff is now and was at all of the times hereinafter in this complaint mentioned, a corporation duly organized and existing

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under and by virtue of the laws of the state of Washington, and that the object and purpose of said plaintiff and the object and purpose for which plaintiff was organized is as follows, to wit:

1st: To catch, boom, sort, raft and boom logs, lumber piling timber, shingle bolts, and any and all other timber products of any and all kinds whatsoever.

2nd: To acquire, use hold and transfer any and all such real and personal estate or property by lease, purchase or otherwise as shall or may be necessary, convenient or advisable to carry on the business of this corporation.

487 3rd: To construct booms by driving piles or otherwise and to maintain such booms, and to construct boom works for catching, booming, rafting, storing or sorting any and all logs shingle bolts or other timber products of any and every kind and nature, which may be put into or come down North river in Pacific county, Washington.

4th: To buy, hire, rent or in any way acquire tugs, steam boats, and other vessels and floats and any and all appliances necessary or convenient in the conducting of the business of this corporation or any part thereof, and in towing or transporting any and all of said logs timber and timber products.

5th: To do and perform any and all business and things conveni*tnet*, necessary or advisable in the conduct of all or any part of the foregoing work and improvement, whether particularly enumerated in these articles or not and consistent with these articles and by-laws of this corporation.

2.

That plaintiff did on or about the 19th day of March A. D. 1900 file in the office of the county auditor of and for Pacific county, Washington and also in the office of the secretary of state of the state of Washington, its articles of incorporation, and within ninety days thereafter, and on or about the 5th day of April A. D. 1900, said plaintiff corporation filed in the office of the secretary of state of the state of Washington, a plat and survey of so much of the shore lines and waters of the state of Washington and of North river in said state and the lands contiguous thereto as were and are proposed to be appropriated by said plaintiff for the object and purposes for which it was organized. And that said plat and survey were made

488 from the records of the United States in the surveyor general's office of this state, and by a competent and skillful civil engineer subsequent to actual survey. That a copy of said plat and survey is hereto attached marked Exhibit A. and is made a part of this complaint.

3.

That pursuant *ot* the object and purpose for which plaintiff was organized and in order to enable plaintiff to carry out the object and purpose for which it was organized, as aforesaid, plaintiff did on or about the — day of ——, 1900, purchase and become the lawful owner of among other lands of the following described tide lands of

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the second class situated on, alongside and abutting and within said North river in Pacific county, Washington, to wit:

All tide lands of the second class situated in front of and abutting upon lots 5, 6 and 7 of Section 23; and lots 5, 6 and 7, of Section 22; and lots 5 and 6 of Section 27; and lots 1, 2, 3, 5 and the Amos Smith Donation Land Claim in Section 26 all in township 15 north of range 10 west of Willamette principal meridian, in Pacific county, Washington. And that plaintiff ever since it became the owner of said lands and premises, has been in the possession of and entitled to the possession of said lands and premises and the whole thereof, and is now in the possession of the same and the whole thereof and is the owner of the same and of the whole thereof. That now and ever since the time that plaintiff became the owner of said lands and premises, the same and the whole thereof, have been and now are necessary and required by plaintiff in the maintenance and operation of its boom, and booms, hereinafter mentioned, and in carrying out the object and purpose for which said plaintiff was or-
489 ganized, and the same and the whole thereof have been ever since plaintiff became the owner of said lands and premises, and now are used by plaintiff in maintaining and operating its boom, and booms and sheer booms, hereinafter in this complaint mentioned.

4.

That pursuant to the object and purpose for which said plaintiff corporation was organized, as aforesaid, plaintiff did on and between the 5th day of April A. D. 1900, and the 1st day of October 1900 upon the tide lands hereinabove described, and upon the shore lines and waters of said North river within Pacific county, Washington, which shore lines and waters were appropriated by plaintiff, and are particularly described and shown by and in plaintiff's said plat and survey which were filed, as aforesaid in the office of the secretary of state of the state of Washington, on the 5th day of April, 1900, and which plat and survey are hereto attached and marked exhibit A, and are made a part hereof, build and erect a boom, and booms, sheer booms, receiving booms, dolphins, piers, piling and other necessary structures, and since said time plaintiff has constantly been obliged to and has and now is upon said tide lands and upon the shore lines and the waters of said North river within said Pacific county, Washington, erecting piling, and sheer booms, and other structures necessary and in order to enable it to carry on the object and purpose for which it was organized, as aforesaid.

5.

That on the 1st day of October, 1900, and ever since said time and at the present time, plaintiff has maintained, and used and
490 operated, and is now maintaining, using and operating the said boom, booms, sheer booms, dolphins, pilings, and piers, and structures, for the purpose of catching, holding, sorting, and booming logs and all other timber products, of all persons, upon the same terms and without discrimination, and that the price charged for catching, holding, sorting, booming and rafting logs and other

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timber products, by said plaintiff always has been and now is less than seventy-five cents per thousand feet namely 60 cents per thousand feet, for catching, holding, sorting, booming and rafting logs, spars or other large timber, and reasonable rates on all other timber products. And that plaintiff has boomed, assorted, and rafted for the owners, and upon the same terms and without discrimination, and at a price per thousand feet less than what plaintiff could have legally charged, under the statute of the state of Washington, during the following years about the following number of thousand feet of logs, to wit:

During the year 1900, 7,000,000 feet.
During the year 1901 8,000,000 feet.
During the year 1902, 9,000,000 feet.

and to the present time of the year 1903, 12,000,000 feet. That plaintiff has ever since on or about said 1st day of October 1900, been able, ready and willing to, and has, without discrimination, and upon the same terms, and which terms have been less than the maximum amount allowed by the laws of the state of Washington, for such services, caught, held, boomed, assorted and rafted all logs, spars and other timber products, which have come into and which have been placed into said North river, when requested by the owners so to do.

6.

That the plaintiff is now and ever since it erected as afore-
491 said, its said boom, booms, sheer booms and receiving booms, piling, piers, dolphin, and structures on said tide lands and in the waters of said North river, in said Pacific county, it has been the lawful owner of and in possession of and entitled to the possession of its said booms, boom, sheer boom and receiving booms, and dolphins, and piling and piers, and plaintiff is now and at all of the times in the future during the period of its existence namely, 50 years from the date of its incorporation, aforesaid, will be, able, ready and willing to catch, hold, sort, boom and raft in its said boom and booms and works, for all persons, and for such price and in *in* such a manner as the statute of the state of Washington, now prescribes, or may hereafter prescribe, all logs, spars, and all other timber products that are now or may be in the future placed in the waters of said North river, for the purpose of being held, boomed, assorted or rafted.

7.

That plaintiff -as expended large sums of money in the building of its said boom, sheer boom and piling and in making the said improvements necessary to enable it to carry on its said business of catching, holding, sorting booming and rafting logs and other timber products in and on said North river, to wit: the sum of $16000.00.

8.

That there are many millions feet of logs, spars and other timber products, the exact amount being to plaintiff, unknown, which are

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tributary to, and which will and must come down said North river and be caught, held, sorted, boomed and rafted in plaintiff's
492 said boom and works erected and maintained as aforesaid for said purpose.

9.

That plaintiff's said boom and works and improvements, for the catching, holding, sorting booming and rafting of logs and spars and other timber products, are of much value and profit to plaintiff by reason of the fact of the logs, spars and other timber products caught and to be caught therein during this and future years.

10.

That all of the waters and shore lines of said North river which were and are appropriated by plaintiff corporation, as is more particularly shown by plaintiff's said plat and survey which were filed as aforesaid, in the office of the secretary of state of the state of Washington, on the 5th day of April 1900, and a copy of which plat and survey, is hereto attached, marked exhibit A, and which are made a part of this complaint, were at the time of the filing of said plat and survey, and ever since have been and now are necessary and required and used by plaintiff in the operation of its business and the maintenance and operation of its said boom, booms, and works; and that plaintiff has at all of the times since its organization and the filing of its plat and survey, as aforesaid, used in the maintenance and operation of its said boom, booms, sheer booms, and works, in the catching, holding, assorting, booming and rafting of logs and spars and all other timber products, in said North river in said Pacific county, Washington, all of said waters and shore lines as is shown on said plat and survey. And that plaintiff cannot maintain or operate its said boom and booms, and works, without using the same and the whole thereof.

493 11.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the state of Washington, the same having been organized only from on or about the 26th or 27th day of August, A. D. 1903. And that said defendant purports to be organized for the object of booming logs, and improving North river within the state of Washington.

12.

That the defendant on or about the 27th or 28th day of August, 1903, filed in the office of the secretary of state of the state of Washington, an instrument purporting to be a plat and survey of a proposed boom, in said North river Pacific county, Washington, and that defendant by said proposed plat and survey, and otherwise and by its overt acts is seeking and endeavoring to and *is and* will, unless restrained by an order of this court, enter into the possession of and appropriate to its own use, the above described tide lands of plaintiff and all of the shore lines, and waters, and the lands

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contiguous thereto, which are particularly described in plaintiff's said exhibit A.

13.

That said purported plat and survey filed as aoresaid by the defendant, was not made from the records of the United States in the office of the surveyor general of the state of Washington, nor by a surveyor after an actual survey from the notes thereof, nor in any manner whatever provided by law.

14.

That the said pretended plat and survey of the defendant
494 purports to cover the same tide lands, shore lines, and waters of said North river within said Pacific county, as were and are appropriated by plaintiff, and the same tide lands, shore lines, and waters of said North river, as were and are appropriated by plaintiff's said plat and survey, as is shown by plaintiff's exhibit A, aforesaid, and the same tide lands, shore lines and waters of said North river as are now used by plaintiff in the maintenance and operating its said boom, booms, sheer booms, and works, for the catching, holding, sorting, booming and rafting of logs and other timber products.

15.

That North river is a large stream of water situated within the state of Washington, and flowing in and through Pacific county in said state, and that said North river and every part thereof, that is described in plaintiff's said exhibit A, is affected by the ebb and flow of the tide.

16.

That plaintiff among other lands, owns the hereinabove described tide lands of the second class, which lie alongside and abutt on said North river; and that P. J. McGowan is also the owner of tide and other lands which lie alongside and abutt on said North river.

17.

That plaintiff and said P. J. McGowan are the owners of more than one-half of the lands lying alongside and abutting on said North river within Pacific county, Washington, and lying alongside and abutting on said North river within the boundaries and territory thereof, proposed to be and which defendant is making and
495 purporting to make its alleged and intended improvement.

18.

That within 15*th* day- from the filing by the defendant of said instrument, purporting to be a plat and survey of the shore lines of the waters and of the waters of said North river and lands contiguous thereto within Pacific county, Washington, as defendant proposes to and is appropriating and on the 10th day of September, 1903, the said plaintiff and said P. J. McGowan made and filed with the board of county commissioners of and for Pacific county,

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Washington, a remonstrance in writing against any and all improvements by said defendant in said North river and every part thereof.

19.

That the defendant, its agents, officers and employees did on or about the 7, 8, 9, 10, 11 and 12, 14 & 15th days of September 1903 unlawfully and without the consent of plaintiff, enter upon the tide lands above described of plaintiff, and upon the shore lines and waters of said North river, within Pacific county, Washington, and which are described in that certain plat and survey which were filed as aforesaid by plaintiff in the office of the secretary of state of the state of Washington, and which plat is attached to this complaint, and marked exhibit A, and made a part hereof, and which shore lines and waters of said North river were and are appropriated and used by plaintiff for necessary use in the maintenance of its said business of holding, catching, sorting booming and rafting of logs, and spars and other timber products, and then and there defendant unlawfully and without the consent of plaintiff
496 drove many large piling-, and other large timbers and structures and is now driving and erecting other large piling and timber and structures therein and thereon, and intends to, and will unless restrained by an order of this court to continue to drive therein and thereon, piling and timbers and erect structures as aforesaid, thereby rendering plaintiff's said boom and sheer boom, booms and works useless and unable to catch, hold, assort, boom or raft logs or spars or other timber products, or any or either of them, and thereby irreparably damaging plaintiff.

20.

That the defendant its agents, officers and employees did on or about the 6, 7, 8, 9, 10, and 11, 12, 14, & 15th days of September 1903, unlawfully and without plaintiff's consent enter upon the shore lines and waters of said North river within Pacific county, Washington, in front of plaintiff's said main boom and the entrance and mouth thereof, and within about ten feet thereof, did unlawfully drive many large piling timbers and other large structures and intends to, and will continue to drive more large piling and timbers and erect large structures therein and thereon thereby entirely cutting off plaintiff's said boom, booms, and sheer boom and works, and thus rendering plaintiff's said main boom, and sheer boom and works, unfit and useless, and preventing the same from catching, holding, sorting booming and rafting logs, and spars and other timber products, and rendering the same and the whole thereof, useless and unable to do any of said things.

21.

That said North river within Pacific county, Washington
497 at the place where plaintiff has and maintains and operates its said boom and sheer booms and works, or catching, holding, sorting, booming and rafting logs and other timber products,

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is of the width of not to exceed 170 feet, and plaintiff's said boom, booms, sheer booms, and works, and structures do not in any manner whatever or at all, obstruct navigation in said North river, and the same and the whole thereof, are constructed and maintained and operated so as to allow free passage between the same and the opposite shore for all boats, vessels, steam crafts of every kind whatsoever, for the ordinary and all purpose- of navigation. And that defendant's said piling and structures so driven as aforesaid in said North river and in said places do obstruct said North river within Pacific county, Washington, and do not allow the free nor any passage between the said piling and timbers and structures, of the defendant, and the opposite shore for any boat, vessel, steam craft or any or either of them, or for the ordinary or any purpose of navigation whatever.

22.

That unless defendant is restrained and enjoined from the further driving of piling and other timbers upon the lands and in the waters, aforesaid, and from the making of any further pretended improvement, aforesaid, plaintiff will be irreparably and greatly damaged and that the exact amount of said damages to plaintiff cannot from the nature of the business of booming and rafting logs and other timber products, be ascertained or computed.

23.

That the defendant corporation is impecunious, financially embarrassed and insolvent, and is not financially able to re-
498 spond in damages or to pay plaintiff for any damages which it may do or commit to said boom and booming works.

24.

That plaintiff does not have any plain, speedy or adequate remedy at law nor any remedy at law whatever.

25.

That an emergency exists and plaintiff does not have time to give defendant notice of an application for a temporary restraining order.

Wherefore plaintiff prays for a judgment and decree of this court as follows:

1.

That a temporary restraining order be immediately issued herein, restraining the defendant, its officers, agents, and employees from doing any of the acts complained of in this complaint, and from driving any piles, timbers or any other structures whatever in said North river within Pacific county, Washington, upon plaintiff's said tide lands, and the shore lines and waters of said North river within the territory appropriated and used by the plaintiff, as shown by its said exhibit A. And that said temporary restraining order be made to continue during the pendency of this action, and that the defendant, its agents, officers and employees be restrained and

prohibited from doing any of the acts complained of in this complaint, during the pendency of this action.

2.

That the defendant, its officers, agents and employees and
499 those acting under or in aid of defendant be forever restrained and prohibited from doing any of the acts complained of in this complaint, and from entering upon the tide lands of said plaintiff, and from entering upon in any manner whatever of the shore lines and waters of said North river within the territory appropriated and used by plaintiff for its said booming works, and from driving any piles, timber or anything else on plaintiff's said tide lands, or any part thereof, and from driving any piling or other thing whatever within said North river or the shore lines thereof, within the territory in Pacific county, Washington, which is appropriated by plaintiff, as described in plaintiff's said exhibit A.

3.

That plaintiff recover its costs and disbursements herein.

4.

That the court grant to plaintiff such other further and separate relief as to the court may seem meet and agreeable to equity.

WELSH BROS.
Plaintiff's Attorneys.

500 STATE OF WASHINGTON, *County of Pacific, ss:*

P. J. McGowan, being first duly sworn upon my oath, depose and say: That I am the duly qualified and acting president of the Nicomen Boom Co., which is a corporation and that as such officer I make this verification for and in behalf of plaintiff, That I have heard the above and foregoing complaint read, and know the contents thereof, and each and every allegation in said complaint contained, and the whole thereof, is true, as I verily believe.

P. J. McGOWAN.

Subscribed in my presence and sworn to before me this 16th day of September, 1903.

MARTIN C. WELSH,
Notary Public for the State of Washington,
Residing at South Bend, Wash.

(Martin C. Welsh, Notary Public, State of Washington.)
(Commission Expires Oct. 21, 1906.)

Filed Sept. 16th, 1903.
E. A. SEABORG, *County Clerk.*
By M. H. CARMICHAEL, *Deputy.*

500*a* WESTPORT, WASH., *March* 30, 1900.

I, the undersigned, a competent surveyor, do hereby certify that the attached is a plat of survey of so much of the shore line of the waters of the state and lands contiguous thereto as are proposed to be appropriated for booming purposes by the Nicomen Boom Co., a corporation.

I further certify that said plat was made from the records of the United States in the surveyor general's office of the state of Washington.

I further certify that said plat was also made by me subsequent to an actual survey made by myself.

Witness my hand this 30 day of March, 1900.

J. M. CLAPP, *Surveyor.*

Ten Cent U. S. Internal Revenue Stamp cancelled.

(Here follows map marked page 500*b*.)

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501 In the Superior Court of the State of Washington, in and for the County of Pacific.

STATE OF WASHINGTON, *County of Pacific, ss:*

I, Thomas Roney, Sheriff of and for Pacific County, Washington, do hereby certify: That I received the attached summons on the 16th day of September, 1903, and on the 16th day of September, A. D. 1903, within Pacific County, Washington, I personally served the attached summons on North Shore Boom and Driving Company, it being the defendant named in said Summons by, at said time and place, personally delivering to and leaving with said J. W. Kleeb, the president of said defendant corporation, a true, correct and certified copy of said summons and together therewith and attached thereto a true, correct and certified copy of the attached complaint in the within entitled action.

Dated at South Bend, Washington, this 16th day of September, A. D. 1903.

THOMAS RONEY,
Sheriff of Pacific County, Washington,
By AMON MARKHAM, *Deputy.*

Sheriff's fees:
Mileage..... .20 cents
Service..... .60 "

Total..... .80 cents.

Filed Sept. 30, 1903,
E. A. SEABORG, *County Clerk,*
By M. H. CARMICHAEL, *Deputy.*

502 In the Superior Court of the State of Washington in and for the County of Pacific.

THE NICOMEN BOOM COMPANY, Plaintiff,
vs.
THE NORTH SHORE BOOM AND DRIVING COMPANY, Defendant.

Answer.

Comes now the defendant in the above entitled action and answering to the complaint of plaintiff herein denies, qualifies and alleges as follows:

I.

Defendant admits the allegation contained in paragraph 1 of said complaint.

II.

Defendant denies each and every allegation contained in the last twelve lines of paragraph II of said complaint.

III.

Defendant denies each and every allegation contained in paragraph III of said complaint and the whole thereof.

IV.

Defendant denies each and every allegation contained in paragraph IV of said complaint and the whole thereof except as hereinafter qualified.

V.

Defendant denies each and every allegation contained in paragraph V of said complaint and the whole thereof, ex- as hereinafter qualified.

503

VI.

Defendant denies each and every allegation contained in paragraph VI and the whole thereof.

VII.

Defendant denies each and every allegation contained in paragraph VII of said complaint and the whole thereof, and avers that the cost of constructing said pretended improvement did not exceed the sum of $12000.00.

VIII.

Defendant admits that portion of paragraph VIII of said complaint ending with the words "tributary to" and denies each and every allegation contained in the remainder of said paragraph and the whole thereof.

IX.

Defendant admits the allegation contained in paragraph IX of said complaint.

X.

Defendant denies each and every allegation contained in paragraph 10 of said complaint and the whole thereof.

XI.

Defendant admits paragraph XI of plaintiff's complaint.

XII.

Defendant admits that part of paragraph XII ending with the words "Pacific county, Washington" and allege that thereafter and prior to the commencement of this action it filed in the office of the secretary of state of the state of Washington a supplemental plat showing the shore line and waters of North river and the lands contiguous thereto, as defendant proposed to appropriate for booming and driving purposes, and as required by law. Defendant denies

each and every allegation contained in the remainder of said paragraph XII and the whole thereof.

504

XIII.

Defendant denies each and every allegation contained in paragraph XIII of said complaint and the whole thereof.

XIV.

Defendant denies each and every allegation contained in paragraph XIV and the whole thereof.

XV.

Defendant admits the allegations contained in paragraph XV of said complaint.

XVI.

Defendant denies each and every allegation contained in paragraph XVI of plaintiff's complaint and the whole thereof.

XVII.

Defendant denies each and every allegation contained in paragraph XVII of said complaint and the whole thereof.

XVIII.

Defendant denies each and every allegation contained in paragraph XVIII of said complaint and the whole thereof.

XIX.

Defendant denies each and every allegation contained in paragraph XIX of said complaint and the whole thereof.

XX.

Defendant denies each and every allegation contained in paragraph XX of said complaint and the whole thereof.

XXI.

Defendant denies each and every allegation contained in paragraph XXI of said complaint and the whole thereof, and avers that the width of said North river at all of said points mentioned in said paragraph is four hundred feet and more.

505

XXII.

Defendant denies each and every allegation contained in paragraph XXII of said complaint and the whole thereof.

XXIII.

Defendant denies each and every allegation contained in paragraph XXIII of said complaint and the whole thereof.

XXIV.

Defendant denies each and every allegation contained in paragraph XXIV of said complaint and the whole thereof.

XXV.

Defendant denies each and every allegation contained in paragraph XXV of said complaint and the whole thereof.

XXVI.

Defendant disclaims any right interest or intention to use or occupy any of the shore lines of the waters and lands contiguous thereto of North river below the southerly boundary of lot numbered one in section 27, township fifteen north, range ten west, W. M., Pacific County, Washington, being the area on which the whole of plaintiff's improvements are situated.

Wherefore, defendant prays that the above entitled action be dismissed at plaintiff's costs.

H. W. B. HEWEN,
W. H. ABEL,
Attorneys for Defendants.

506 STATE OF WASHINGTON, *County of Pacific, ss:*

John W. Kleeb, being first duly sworn, on oath says that he is the president of the North Shore Boom and Driving Company, incorporated, and that he makes this verification for and on behalf of said corporation; that he has read the above and foregoing complaint, knows its contents and that the matters and things therein contained are true.

JOHN W. KLEEB.

Subscribed and sworn to before me this 18th day of September 1903.

H. W. HEWEN,
Notary Public of Washington, Residing at South Bend, Washington.

[Seal H. W. B. Hewen, Notary Public, State of Washington.]

(Commission expires June 2, 1906.)

Service of the within answer by receipt of copy thereof admitted at South Bend, Wash., the 19th day of Sept. 1903.

WELSH BROS.,
Att'ys for Plaintiff.

Filed Sep. 22, 1903.
E. A. SEABORG,
County Clerk.

507 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff,
vs.
NORTH SHORE BOOM & DRIVING CO., Defendant.

Supplemental Complaint.

Comes now the plaintiff and asks leave of court, and makes this its supplemental complaint herein and alleges:

That since the commencement of this action, and within the last few days, defendant in disregard of plaintiff's rights in the premises, has completed its boom structure, by permanently driving piling and dolphins into the bed of North river and the shore thereof, or along and across a portion of North river heretofore and before the commencement of this action, duly appropriated by plaintiff for booming purposes as now fully appears by the original complaint herein; that the construction of said boom and booming works will interfere with and prevent the extension of plaintiff's boom or the operation of the same and will entirely cut the same off from the navigable portion of said North river; that by the construction of the plaintiff's extension to its boom, and the construction of the defendant's boom, the entire channel and waters of said Nortn river throughout the length of defendant's boom and throughout a large portion of the length of plaintiff's boom, will *or* entirely and wholly closed to navigation, to the great and irreparable damage to plaintiff; that the construction of defendant's said boom, cuts off
508 the ingress and egress of plaintiff to and from its lands and boom, to the navigable portion of said North river to its great and irreparable damage; that the said defendant, as plaintiff is informed and believes, and therefore alleges, that defendant has attached its said boom to the lands and premises of the plaintiff, without its consent and proposes to keep said boom attached during the season of floating logs, viz., the remainder of this year and future years.

That the defen-ant's boom now located in said North river in said Pacific county, Washington, as aforesaid entirely and wholly prevents and will prevent at any or all future times, plaintiff from using and operating its said boom and booming works in said North river; and that plaintiff can not extend its boom as it always intended to do, and had actually commenced to do, and was driving prior to the time defendant erected its said boom; and that defendant's said boom entirely prevents and will at all times in the future prevent, lo-s and other timber products consigned and to be consigned to the plaintiff's boom, from being caught in the plaintiff's said boom; and that logs and other timber products, which may be and will be consigned to plaintiff's boom must of necessity by reason of the present location of defendant's said boom, be first caught and held in defendant's said boom, and that defendant by reason of the present location of

its said boom cannot within a reasonable time nor at all, pass said logs and other timber products to plaintiff's said boom; and by reason of the present location of the defendant's said boom, it was and is impossible for the plaintiff to drive piling, and booms and other necessary structures, which it was driving at the time of the commencement of this action, as it alleges that it was doing at the time of the commencement, in paragraph No. 4 of its original complaint and by reason of said facts the plaintiff has been and now is
509 irreparably damaged.

Wherefore, the plaintiff prays for judgment as prayed for in its original complaint, and in addition thereto, that the defendant be required to take up and remove all of the piling timber and structures, and booms, which it now has in said North river within Pacific county, Washington.

W. B. STRATTON,
WELSH BROS.,
Plaintiff's Attorneys.

STATE OF WASHINGTON, *County of Pacific, ss:*

H. S. McGowan, being first duly sworn upon his oath says: that he is the secretary of the Nicomen Boom Co., which is a corporation and plaintiff in the above entitled action that he has heard the above and foregoing supplemental complaint read and that he knows the contents thereof and that each and every allegation therein contained and the whole thereof is true as he verily believes.

H. S. McGOWAN.

Subscribed and sworn to before me this 1 day of Dec. 1903.

JOHN T. WELSH,
Notary Public for the State of Washington,
Residing in South Bend and said State.

Filed Dec. 1, 1903.
E. A. SEABORG, *County Clerk.*

510 In the Superior Court of the State of Washington for Pacific County.

THE NICOMEN BOOM CO., Plaintiff,
vs.
THE NORTH SHORE BOOM & DRIVING CO., Defendant.

Answer to Supplemental Complaint.

Comes now the defendant in the above entitled action and answering to the supplemental complaint of plaintiff herein denies the same and the whole thereof, excepting that defendant admits, it has nearly completed its boom structure in a permanent and workmanlike manner and will soon have said improvement finished.

Wherefore defendant prays for judgment herein as asked in its former answer.

H. W. B. HEWEN,
W. H. ABEL,
R. W. RUFFIN,
Def't- Attorney.

STATE OF WASHINGTON, *County of Pacific, ss:*

J. W. Kleeb being first duly sworn on oath says, that he is president of the North Shore Boom and Driving Co., the above named defendant and makes this verification for and on said defendant's behalf, that he has read the foregoing answer to the supple-
511 mental complaint knows the contents thereof and that the same are true as he verily believes.

J. W. KLEEB.

Sworn to and subscribed to before me this 4th day of December 1903.

H. W. B. HEWEN,
Notary Public.

Service of the within answer to supplemental complaint admitted at South Bend, Wash., the 4th day of Dec. 1903.

WELSH BROS.,
Att'ys for Plaintiff.

Filed Dec. 4, 1903.
E. A. SEABORG,
County Clerk.

512 In the Superior Court of the State of Washington for Pacific County.

No. —.

NICOMEN BOOM COMPANY, Plaintiff,
v.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant.

Plaintiff's Proposed Findings of Fact and Conclusions of Law.

This cause having come on for trial on December 1, 1903, before Honorable R. B. Albertson, Judge of the Superior Court of King County, presiding at the request of Honorable A. E. Rice, Judge of this court and at the request of the respective parties; plaintiff being represented in court by its attorneys of record, Welsh Bros., W. B. Stratton and W. M. Gudgel, and the defendant being represented in court by its attorneys of record, H. W. B. Hewen, W. H. Abel and R. W. Ruffin, and the parties having submitted their evidence and proofs and having argued the cause, and the court having taken

the same under advisement, and thereafter on January 15, 1904, the court having rendered its written opinion in the case, and the court now being fully advised in the premises makes the following findings of fact:

I.

That on March 19, 1900, plaintiff was duly organized and incorporated as a corporation of the state of Washington under the boom statutes of said state; that on April 5, 1900, it duly filed in the office of the secretary of state of Washington its plat and
513 survey showing so much of the shore lines and waters of North river, and the lands contiguous thereto, as it proposed to appropriate under the boom statutes of this state; that said plat was prepared in the manner prescribed by statute.

II.

That during the year 1900 the plaintiff purchased, and ever since that time has owned, certain tide lands on the left bank of North river, reckoning down stream; described as follows:

"All tide lands of the second class situated in front of and abutting upon lots 5, 6 and 7 of section 23; and lots 5, 6 and 7 of section 22; and lots 5 and 6 of section 27; and lots 1, 2, 3 and 5 and the Amos Smith Donation Land Claim in Section 26 all in township 15 north of range 10 west of W. M. in Pacific County, Washington, excepting all tide lands in said lot 5 in said section 26 upon which are located any improvements used in connection with the cannery of P. J. McGowan or which may be necessary for the convenient use of said cannery."

III.

That between April 5, 1900, and October 1, 1900, plaintiff built, and has ever since maintained in North river a boom for the purpose of catching, holding, booming and assorting saw logs and other timber products, said boom extending from below the mouth of McGowan's slough up the aforesaid left side of North river to a point about 1500 feet below the lowest extremity of the defendant's boom; that the length of plaintiff's said boom is about — feet; that it was the original intention of the plaintiff to extend the construction of said boom up the left bank of North river as the reasonable demands of business and logging conditions on said river might require
514 as far as the uppermost extremity of the tide lands hereinabove in finding II set out; that plaintiff never at any time abandoned its intention to so extend said boom; that in pursuance of said intention said plaintiff prior to the time the defendant company was incorporated, and prior to the time that it filed its plat of location in the office of the secretary of state, had purchased a large number of suitable piles for the purpose and with the intent in good faith of enlarging and extending its said boom as far up said river as the uppermost extremity of its tide lands as aforesaid; and that before the defendant corporation commenced to construct its boom as hereinafter set forth and before it had taken possession of any of the

waters or shore lines of the North river covered by its plat of location plaintiff procured a pile driver for the purpose of extending and enlarging its said boom; that said pile driver with the engine thereto attached was made ready to drive said piling, but that when the engine of said pile driver was fired the boiler broke and it became necessary to send a portion of the pile driver away for repairs and that while said pile driver was away for repair the work of extending and enlarging said boom was suspended; that the said pile driver was repaired with all due diligence, but by the time plaintiff was able to commence driving the piling of its proposed extension, the defendant herein had commenced to drive piling on the location where its boom is now situated; that the plaintiff's boom as originally constructed is not of sufficient size to catch or hold all the logs and other timber products that come down North river, and plaintiff's proposed extension was for the purpose of sufficiently enlarging its said boom to take care of the logs and timber products that might come down said river. That the proposed extension of plaintiff's boom is
515 necessary and will be constructed without unreasonable delay by plaintiff.

IV.

That plaintiff, in the year 1900, duly secured permission from the secretary of war of the United States to construct and maintain its boom as originally constructed, and as it proposed to enlarge the same.

V.

That on August 26, 1903, the defendant was organized under the laws of the state of Washington and under the boom statutes of said state, and on said date filed in the office of the secretary of state of Washington a plat and survey showing so much of the water and shore lines, and the lands contiguous, as it proposed to appropriate for boom and driving purposes under its articles of incorporation under the statutes of said state; that said plat was prepared in the manner prescribed by the statutes of this state.

VI.

That the only permission which the defendant claims was ever received from the secretary of war to construct a boom is in words and figures as follows, to-wit:

B. O. United States Engineer Office.

SEATTLE, WASHINGTON, *March* 23, 1903.

Mr. John F. Hobi, South Bend, Wash.

DEAR SIR: Referring to your application of February 7, 1903, for permission to construct and maintain a boom for storage of logs in North river, Pacific County, Wash., the secretary of war
516 directs that you be informed "that the war department will interpose no objection to its construction and maintenance

in the manner proposed, as long as it does not unreasonable interfere with navigation."

By direction and in the absence of Major Millis:

Very respectfully, JAMES H. MURPHY,
Chief Clerk.

VII.

That the defendant is the owner and holder, under a lease from the state of Washington, of the tide lands on the right bank of North river in front of lots 1 and 6 in section 26, lots 1 and 2 Section 27, lots 1, 2, 3 and 4 of Section 23, lots 1 and 2 of Section 14, lots 1 to 7 inclusive in Section 13, lots 1, 2 and 3 of Section 24, township 15 North, of range 10 west W. M., and also holds by contract of purchase or other title, the uplands described as lot 1 of section 27, township 15 North, of range 9 West W. M., lot 4 in Section 22, Township 15 North range 10 West W. M., lots 1 2 and 3 of section 22, and lots 1 and 2 of section 23, township 15 north, of range 10 west W. M. Which tide lands and uplands are the lands and premises contiguous to the boom of defendant or occupied by it.

VIII.

That prior to the commencement of this action the defendant commenced to build and construct its said proposed boom, and since this action was commenced it has completed said proposed boom, the lower extremity thereof commencing 1500 feet above the uppermost extremity of the plaintiff's boom as originally constructed and extending up the river and on the opposite side of the river from plaintiff's said boom and proposed extension a distance of about one mile; that defendant's boom extends from the shore on one side to the center of the river, and that plaintiff's proposed extension
517 extends from the shore on the other side to the center of the river, and, if both said enlargement of plaintiff's boom is constructed and the defendant's boom is also constructed, there will be no passageway whatever between said booms for a distance of about one mile and the navigation of said North river for a considerable distance, to wit, the length of defendant's boom, will thereby be entirely blocked for a large portion of the year; that the construction of defendant's boom will prevent the successful and reasonable use of plaintiff's boom as proposed to be extended.

IX.

That defendant's boom as threatened to be constructed and maintained prior to the commencement of this action and as actually constructed since said time does not of itself obstruct the navigation of North river, nor any part of it, nor is any part of said boom built upon the uplands or tide lands of plaintiff or P. J. McGowan, except that the sheer boom which is a part of the main boom of the defendant is attached to the tide lands and uplands of the plaintiff, and without plaintiff's consent; that neither the plaintiff nor P. J. McGowan is prevented in any way from having access to their tide

lands or uplands by the construction of defendant's boom alone, but that if both the plaintiff's proposed extension and the defendant's boom are constructed all access to a large portion of said plaintiff's tide lands and uplands will be entirely cut off from the navigable portion of said North river.

X.

That said North river is affected by the flow of the tide from its mouth to a point above the uppermost extremity of defendant's boom and plaintiff's proposed extension, and that said river is
518 navigable from the mouth to a point above the upper most extremity of said booms and the proposed extension.

XI.

That on August 31, 1903, defendant delivered at the site of its proposed boom, a raft of piling therefor, together with cooking utensils for its camp of men to be employed in constructing the boom, and on September 3, 1903, the pile driver for the construction of its boom arrived from South Bend, and that the work of driving piles for its said boom was commenced by the defendant on September 4; that the area covered by defendant's boom was wholly vacant and unoccupied and not in the possession of plaintiff nor had plaintiff any boom structure or other structure of any nature on said area at the time of the commencement of the construction of plaintiff's proposed extension; nor had plaintiff at any time occupied said boom area, nor erected any structure thereon.

XII.

That while the defendant was engaged in driving piling and constructing its said boom on the right side of North river, looking downwards, being about 1500 feet above the uppermost extremity of plaintiff's boom and on the opposite side of the river the plaintiff on or about the 9th day of September, 1903, pursuant to its intention aforesaid, commenced to drive suitable piling for its proposed extension within 10 feet of the same piling driven by the defendant heretofore; that the boom of the defendant is of a substantial nature; that the plaintiff's boom as originally constructed is of a substantial nature, and that plaintiff proposes to make said extension of a substantial nature.

XIII.

519 That the site of the defendant's boom is within the area of North river, Pacific County, Washington, embraced in the plats of both plaintiff and defendant, and the plat of plaintiff, in addition to the shore lines of North river, includes McGowan's slough, a tidal slough extending from near the lower extremity of plaintiff's boom as originally constructed, 56.50 chains, northeasterly; but that said slough is of very little, if any, practical use for the catching and booming of saw logs or other timber products.

XIV.

That the cost of the construction of plaintiff's boom, as constructed by it in the year 1900, and as maintained by it since that date, is the sum of $16,000; that the cost of the construction of the defendant's boom is the sum of $10,000.

XV.

That the width of North river where defendant's boom is constructed, varies from 200 to 300 feet, and the width of the river left open for navigation if plaintiff's proposed extension be not constructed, varies from 100 to 125 feet that North river is navigable from its mouth to a point above the uppermost extremity of defendant's boom and plaintiff's proposed extension and has been and will be used for navigation by steam boats and other water crafts.

XVI.

That the plaintiff's boom as originally constructed and as proposed to be extended can be operated and maintained without interfering with the navigation of North river; but that defendant's boom and plaintiff's boom as proposed to be extended can not both be maintained or operated without entirely destroying the navigation of said river for a considerable distance, to wit, one mile.

520 XVII.

That the defendant's boom is so constructed that it will necessarily catch all of the logs consigned to the defendant's boom as originally constructed, and that before logs consigned to plaintiff's boom as originally constructed can be delivered to it, said logs must be taken from the defendant's boom and allowed to float down the river to plaintiff's boom; that the logs consigned to plaintiff's boom can only be delivered to it from defendant's boom, as the logs from defendant's boom are rafted for towage to market or mill, and that logs consigned to plaintiff's boom cannot pass the defendant's boom within a reasonable time.

XVIII.

That the defendant at the time this action was commenced, and ever since has been, solvent.

XIX.

That the plat and survey filed in the office of the secretary of state by the plaintiff shows that it intended to appropriate the waters and shore lines of North river over which the proposed extension was to be constructed and up said river to a point where the same intersects with the north line of section 23, township 15 North, range 10 west of Willamette Meridian, in Pacific county.

COPY BOUND

XX.

That defendant's boom is constructed over the waters and shore lines of North river within the plat and survey filed by the plaintiff in the office of the secretary of state.

XXI.

That large quantities of timber yet remain to be cut and removed from the country tributary to North river, which necessarily must be floated down the stream and caught by a boom or booms
521 in order to be marketed; that the estimated quantity which will come down said stream and be rafted the present year is 20,000,000 feet.

And as conclusions of law the court finds:

I.

That the defendant's boom is an unlawful structure.

II.

That plaintiff has the right to make and construct its proposed extension and that defendant has no right to maintain or operate its boom as heretofore constructed.

III.

That plaintiff is entitled to a decree compelling the defendant to immediately remove its said boom.

Dated February 17, 1904.

—— ——, *Judge.*

Service of the proposed findings of fact and conclusions of law are admitted this 18th day of February, 1904.

H. W. B. HEWEN,
W. H. ABEL, AND
R. W. RUFFIN,
Attorneys for Defendant.

Filed Feb. 18, 1904.

E. A. SEABORG,
County Clerk.

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522 In the Superior Court of the State of Washington, in and for Pacific County.

No. 1501.

NICOMEN BOOM COMPANY, Plaintiff,
vs.
NORTH SHORE BOOM AND DRIVING CO., Defendant.

Findings of Fact and Conclusions of Law.

This cause having come on for trial December 1st, 1903, before the Honorable R. B. Albertson, Judge of the superior court of the State of Washington, for the county of King, presiding in the superior court of Pacific County, state of Washington, at the request of Hon. A. E. Rice, judge of said Pacific county superior court, the plaintiff being represented in court by its attorneys of record, Welsh Bros., W. B. Stratton and W. H. Gudgel, and the defendant being represented in court by its attorneys of record, H. W. B. Hewen, W. H. Abel and R. W. Ruffin, and the parties having submitted their evidence and proof and the court having heard the argument of said respective counsel and having taken said action under advisement and having thereafter on the 15th day of January 1904, rendered a written opinion herein directing the entry of certain findings of fact and conclusions of law and a decree based thereon in favor of the defendant, and the plaintiff having filed herein on the 18th day of February, 1904, its request for the entry of certain findings of fact and conclusions of law in accordance with the theory of said defendant, the court being fully advised in the premises makes and enters herein the following

523 *Findings of Fact.*

I.

That on March 19th, 1900, plaintiff was duly organized and incorporated as a corporation of the state of Washington, having for its object, among other things as prescribed in its articles of incorporation, the catching, booming, sorting, rafting and holding logs, timber, and other timber products; that on April 5th, 1900, it duly filed in the office of the secretary of state of Washington its plat and survey, showing so much of the shore lines and waters of North river and lands contiguous thereto as it proposed to appropriate under the boom statutes of the state of Washington.

II.

That during the year 1900, the plaintiff purchased, and ever since that time has owned certain tide lands on the left bank of North river, reckoning down stream, described as follows:

COPY BOUND

"All tide lands of the second class situated in front of and abutting upon lots 5, 6, and 7, of section 23; and lots 5, 6, and 7 of section 22; and lots 5 and 6 of section 27; and lots 1, 2, 3 and 5 and the Amos Smith Donation Land Claim in section 26 all in township 15 north of range 10 west of W. M. in Pacific county, Washington, excepting all tide lands in said lot 5 in said section 26 upon which are located any improvements used in connection with the cannery of P. J. McGowan or which may be necessary for the convenient use of said cannery.

III.

That plaintiff before beginning the construction of its boom also submitted to the secretary of war of the United States of
524 America, a plan of its proposed improvements and a plat of the territory to be occupied thereby, and was granted by said war department permission to construct a boom within the limits of said North river covered by said plat of location.

IV.

That the territory designated by said plat of location of plaintiff embraces the shore of North river, said North river being a tributary of Willapa Harbor or Shoalwater Bay, extending from near the mouth of said river on both sides for a distance of about — miles up the stream. The plaintiff thereupon acquired such up-lands and shore land on the left hand side of the river (reckoning down stream) as was necessary for its use in the premises, and promptly proceeded to erect boom works along the left side of the river as far as it cared to operate at the time, but stopped far short of the upper end of the territory covered by its plat of location.

V.

That the boom of plaintiff consists of a succession of "dolphins," the same being a cluster of piles driven near the middle of the stream and securely bound together, the clusters being about 40 feet apart. Boom sticks are extended along the row of dolphins, on each side thereof, to prevent the escape of logs entering the boom. A short distance above the last dolphin at the upper end of the constructed works, a sheer boom, known as a "rudder boom" is maintained by the plaintiff. It is movable and is anchored to the shore on the opposite side of the river from the row of dolphins, and is so constructed as to intercept all logs coming down the river on that side and shunt them into the boom on the opposite shore. There is a gap between the end of the rudder sheer and the nearest
525 dolphin below sufficient for the passage of water craft. The boom of plaintiff as originally constructed has been constantly operated from the time it was erected. The boom of the plaintiff has never been actually constructed beyond its said rudder sheer, which is a mile or more below the upper end of its located territory. But the plaintiff always expected to extend the boom at some indefinite time as the demands of business might require, within the

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limits of its said plat of location. Several weeks before the commencement of this action, the plaintiff had ordered piling for the purpose of extending its boom as originally constructed about 1000 feet further up the river. That through some delay for which the plaintiff was not responsible, it did not have this piling on the ground and did not commence the actual work of extending its said boom until several days after the defendant had begun to construct its boom as hereinafter mentioned. That it was estimated by the plaintiff that the output of logs on said North river for the season next following the commencement of this action would be largely in excess of the output for the previous year, and that in such case the enlargement of its boom would be necessary for the purpose of accommodating such logs. The plaintiff did not as far as is shown by the evidence have any logs of its own to be caught in its boom nor did it have so far as is shown by the evidence any contracts with the owners of any logs to be put in the river for the catching, holding, booming and sorting of such logs. The said works of plaintiff as originally constructed cost about $16000.00.

VI.

That on August 26th, 1903, the defendant was organized and incorporated under the laws of the state of Washington and under the boom statutes of said state and on said date filed in the
526 office of the secretary of the state of Washington, a plat and survey showing so much of the water and shore lines and land contiguous as it proposed to appropriate for boom and driving purposes under its articles of incorporation and under the statutes of said state. Said plat was prepared in the manner prescribed by law.

VII.

That prior to the commencement of this action the defendant applied to the secretary of war for permission to build a boom within the limits of its said plat of location and that in response thereto, it received from the secretary of war the following and *on* other permission, to wit:—

"B. O. United States Engineer Office.

SEATTLE, WASHINGTON, *March* 23, 1903.

Mr. John F. Hobi, South Bend, Wash.

DEAR SIR: Referring to your application of February 7, 1903, for permission to construct and maintain a boom for storage of logs in North river, Pacific county, Wash., the secretary of war directs that you be informed "that the war department will interpose no objection to its construction and maintenance in the manner proposed, so long as it does not unreasonably interfere with navigation."

By direction and in the absence of Major Millis.

Very respectfully, JAMES H. MURPHY,
Chief Clerk."

VIII.

The plat of location filed by defendant as aforesaid in the office of secretary of state covered substantially the part of the terri-
527 tory embraced in the plat of plaintiff lying above the upper end of the sheer boom constructed by the plaintiff. The defendant thereupon proceeded to acquire up-lands and tide lands within its plat of location on the right hand side of the river, considered necessary for its use in the operation of its proposed boom, such lands being on the bank opposite to the side of the river occupied by the plaintiff. The right of defendant to construct and operate its proposed boom has not been questioned by the owners of any upland or tide land on the right hand side of said river.

IX.

Shortly after the incorporation of defendant, it began to construct a line of dolphins within the limits of both of said plats of location, beginning at a point on the right hand side of the river, near the center thereof about 1500 feet above the rudder sheer of plaintiff. On August 31, 1903, defendant delivered at the site of its proposed boom, a raft of piling therefor and on September 3, 1903, placed on said site a pile driver for the construction of its proposed boom, and that the work of driving piles for its said boom was commenced by the defendant on September 4, 1903. Up to that time no structure of any kind h-d been erected by plaintiff within the limits of the territory so located on and occupied by the defendant, nor was any part of said territory in actual occupation by the plaintiff. The defendant had been for some weeks past preparing to construct its boom within the entire limits of its located territory and the plaintiff had been for the same period preparing to extend its boom for a distance of 1000 feet up said river but as far as appears, each was ignorant of the plans of the other until work was actually begun by the defendant. The plaintiff also began work on the extension
528 of its old boom a few days after the defendant began its said work of construction, but plaintiff has not prosecuted said work since the commencement of this action. Since this action was begun defendant has substantially completed its proposed boom.

X.

The construction of the two booms is practically the same except with regard to the sheer boom. The sheer boom of plaintiff is a rudder sheer while the sheer boom of defendant at the upper end of its works consists of a stationary dolphin erected above the line of the dolphins constituting the main boom, and on the opposite side of the river therefrom about 15 feet from the bank. There is a gap between this sheer boom and the upper dolphin of the main boom sufficiently wide for the passage of such water crafts as ply on the river. The purpose of this sheer boom is to intercept logs coming down the river on the left hand side, being the side occupied by the boom of the plaintiff. Defendant proposes to accomplish this

result by connecting the sheer boom with the upper dolphin of the main boom through the agency of a boom stick. The logs coming down the river on the left hand side would thereby be shunted into the mouth of the main boom of defendant.

XI.

The booms proposed by plaintiff and defendant cannot both be constructed. If the boom of the plaintiff should be extended up the river, the passage between its line of dolphins and the dolphin of defendant on the other side of the stream would be so narrow as to block navigation, nor would it be practicable to operate both of the booms under such circumstances. If the defendant company is permitted to operate the boom so constructed by it, the boom of plaintiff would only receive such timber product from up the river
529 as might escape the boom of defendant or might be transmitted through that boom to the plaintiff. The passage of logs through the boom would interfere with the business of the plaintiff to the extent of the delay caused thereby.

XII.

The defendant has not erected any improvement or structures on any part of the up-lands or tide lands belonging to the plaintiff, nor do the structures erected by defendant render these lands less accessible from the river. The line of dolphins constituting the main boom of defendant is constructed on the other side of the river.

XIII.

The sheer boom and receiving boom of defendant are so constructed as to allow free passage between same and the opposite shore for all boats, vessels or steam craft that ply on the river and for the ordinary purpose of navigation. While North river is a meandered and navigable stream both above and below the lines of the territory covered by the plat of defendant while the tide rises and falls for a mile or more above the uppermost end thereof, yet the portion of the river above the boom of defendant is not navigable in the ordinary sense at low tide. The navigability of the river is occasioned chiefly by flooding of the tide. In the dry season the portion of the river not affected by the tide is not navigable. In such season logs cannot be floated down that part of the stream. They can only be brought to tide water through the swelling of the stream caused by occasional freshets. While the river is navigable at ordinary high tide within the tidal section for such vessels as ordinarily have occasion to ply thereon, yet as a matter of fact the chief use of the
530 river is for floating logs out from its upper shores, less than twelve settlers live along banks of the river and their customary means of transportation is by the use of canoes and row-boats. There is a bar near the mouth of the river opposite Hawks Point, which at low tide cannot be crossed by vessels of any considerable draught. Such vessels as are able to cross this bar can only proceed

up the river beyond the further end of the territory in dispute notwithstanding the boom of the defendant.

XIV.

The site of the boom of defendant is within the area of North river embraced in the plat of both plaintiff and defendant. The plat of the plaintiff includes in addition to the shore lines of North river, McGowan's slough, a large tidal slough extending from near the mouth of plaintiff's boom 56.50 chains northeasterly and that said slough is available for the extension of the boom of plaintiff.

XV.

That the cost of the construction of the boom of defendant is about the sum of $10,000.

XVI.

That the width of North river where the boom of defendant is constructed varies from 200 to 300 feet in width. The river left open for navigation from 100 to 125 feet.

XVII.

That the boom of the plaintiff and of the defendant as at present constructed can be operated without interfering with the navigation of North river, and that the boom of defendant is so constructed that it can without unreasonable delay pass logs and other timber product consigned to the boom of the plaintiff.

531 XVIII.

That the defendant is a solvent corporation.

XIX.

Large quantities of timber yet remain to be cut from the upper shores of North river which necessarily must be floated down stream in order to be rafted and marketed.

Done this 10th day of March, 1904.

R. B. ALBERTSON, *Judge.*

As conclusions of law from the foregoing findings of fact, the court finds:

Conclusions of Law.

I.

That the plaintiff did not proceed within a reasonable time to appropriate the territory covered by the plat of defendant or any part thereof.

II.

That the boom of defendant is a lawful structure.

III.

That the area occupied by the boom of the defendant is rightfully in the possession of defendant herein, and the equity of the case is with the defendant.

IV.

That the defendant is entitled to a decree of this court dismissing this action and awarding to the defendant its costs and disbursements herein.

Done in open court this 10th day of March A. D. 1904.

R. B. ALBERTSON, *Judge.*

Filed Mar. 12, 1904.
E. A. SEABORG,
County Clerk.

Recorded Court Journal Vol. 9, page- 580-586.

532 In the Superior Court of the State of Washington in and for Pacific County.

No. 1501.

NICOMEN BOOM COMPANY, Plaintiff,
vs.
NORTH SHORE BOOM AND DRIVING CO., Defendant.

Decree.

The court having on the 10th day of March, 1904, made and entered herein its findings of fact and conclusions of law based upon the evidence submitted to the court at the trial of the above entitled action, and the defendant having moved for judgment in its favor based upon the findings of fact and conclusions of law, and the court being now duly advise- in the premises, said motion is hereby granted and it is therefore

Considered, Ordered, Adjudged and Decreed by the court that the plaintiff take nothing by this action and that its application for an injunction against the defendant be and the same is hereby denied and that this action be and the same is hereby dismissed; and that the defendant have and recover of and from the plaintiff its costs and disbursements in this action to be taxed.

Done in open court this 10th day of March, 1904.

R. B. ALBERTSON, *Judge.*

Filed Mar. 12, 1904.
E. A. SEABORG, *County Clerk.*

Recorded Court Journal Vol. 9, page 587.

533 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff,
vs.
NORTH SHORE BOOM AND DRIVING CO., Defendant.

Plaintiff's Exceptions to the Court's Refusal to Sign the Findings of Fact & Conclusions of Law, Proposed by Plaintiff.

Comes now the plaintiff in the above entitled action and hereby excepts to the refusal of the court in the above entitled action in refusing to make, find and sign the findings of fact, and the conclusions of law, filed herein by plaintiff and proposed by plaintiff, and plaintiff's exceptions are as follows, to-wit:

1.

Plaintiff excepts because the court refused to make sign and find finding of fact, as proposed by the plaintiff.

2.

Plaintiff excepts to the refusal of the court, in refusing to make find and sign finding of fact No. 2, as proposed by plaintiff.

3.

Plaintiff excepts to the court's refusal to make, find and sign, finding of fact No. 3 proposed by plaintiff.

4.

Plaintiff excepts to the court's refusal to make, find and sign, finding of fact No. 4 which was proposed by plaintiff.

5.

534 Plaintiff excepts to the court's refusal to make, find and sign, finding of fact No. 5, which was proposed by plaintiff.

6.

Plaintiff excepts because the court refused to make, sign and find, finding of fact No. 6, which was proposed by plaintiff.

7.

Plaintiff excepts because the court refused to make, find and sign finding of fact No. 7 as proposed by the plaintiff.

8.

Plaintiff excepts to the refusal of the court, in refusing to find, make and sign finding of fact No. 8, which was proposed by plaintiff.

9.

Plaintiff excepts to the refusal of the court, in refusing to make find and sign finding of fact No. 9, as proposed by the plaintiff.

10.

Plaintiff excepts to the refusal of the court, in refusing to make, sign and find, finding of fact No. 10 as proposed by the plaintiff.

11.

Plaintiff excepts to the refusal of the court in refusing to make, sign and find, finding of fact, No. eleven, proposed by the plaintiff.

12.

Plaintiff excepts to the refusal of the court, in refusing to make, find and sign, finding of fact No. 12, as proposed by plaintiff.

13.

Plaintiff excepts to the court's refusal in refusing to make,
535 sign and find finding of fact No. 13, proposed by plaintiff.

14.

Plaintiff excepts to the refusal of the court, in refusing to make, find and sign, finding of fact No. 14, proposed by plaintiff.

15.

Plaintiff excepts to the refusal of the court in refusing to make, find and sign, finding of fact No. 15, which was proposed by plaintiff.

16.

Plaintiff excepts to the refusal of the court in refusing to make, find and sign, finding of fact No. 16, which was proposed by the plaintiff.

17.

Plaintiff excepts to the refusal of the court in refusing to make, find and sign, finding of fact No. 17, which was proposed by the plaintiff.

18.

Plaintiff excepts to the refusal of the court in refusing to make, sign and find finding of fact No. 19, which was proposed by the plaintiff.

19.

Plaintiff excepts to the refusal of the court in refusing to make, find and sign, finding of fact No. 20, which was proposed by the plaintiff.

21.

Plaintiff excepts to the refusal of the court in refusing to make, sign and find, finding of fact No. 21, which was proposed by the plaintiff.

536 Plaintiff in the above entitled action excepts to the refusal of the court, in refusing to make, find and sign, the conclusions of law, which the plaintiff filed herein, and requested the court to find as such conclusions of law, and plaintiff's exceptions are as follows:

1.

Plaintiff excepts to, and because the court refused to make, find and sign, conclusions of law numbered one, which conclusions of law, No. one was proposed by plaintiff.

2.

Plaintiff excepts to the refusal of the court in refusing to make, find and sign conclusion of law No. 2, as proposed herein by plaintiff, and plaintiff excepts because the court refused to sign said conclusion of law.

3.

Plaintiff excepts to the refusal of the court, in refusing to make, find and sign, plaintiff's proposed conclusion of law No. (3) three.

4.

Plaintiff excepts because the court refused to make, sign and find, each and all of the conclusions of law, which the plaintiff herein filed, and requested the court, make and sign, and said conclusions of law, which were proposed by plaintiff are No. one, two and three.

W. B. STRATTON,
WELSH BROS., AND
WM. H. GUDGEL,
Plaintiff's Attorneys.

537 Service of the foregoing exceptions is admitted this 14th day of March, 1904.

H. W. B. HEWEN,
W. H. ABEL AND
R. W. RUFFIN,
Attorneys for Defendants.

Filed Mar. 14, 1904.
E. A. SEABORG, *County Clerk.*
By M. H. CARMICHAEL, *Deputy.*

538 In the Superior Court of the State of Washington, in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff,
vs.
NORTH SHORE BOOM AND DRIVING COMPANY, Defendant.

Plaintiff's Exceptions to Findings of Fact and Conclusions of Law.

Comes now the plaintiff in the above entitled action, and makes and files its exceptions to the findings of fact and conclusions of law, which were made and filed by the court in the above entitled action, and plaintiff's exceptions are as follows:

1.

Plaintiff excepts to finding of fact No. V as follows, plaintiff excepts to all that part of said finding of fact No. 5 which reads as follows to wit:

"The boom of plaintiff has never been actually constructed beyond its rudder sheer, which is a mile or more below its said, located territory *territory,*" and said part excepted to constitutes and is all of lines numbered 16, 17 and 18 of said finding of fact, and plaintiff excepts to the same for the reason that the same and the whole of that part of said finding of fact excepted to, is contrary to the evidence, and is against the evidence, and is contrary to the law.

2.

Plaintiff excepts to all that part of said finding of fact No. 5, which reads as follows, to wit:

"The plaintiff did not as far as is shown by the evidence
539 have any logs of its own to be caught in its boom nor did it have as far as is shown by the evidence any contracts with the owners of any logs to be put in the river for the catching, holding, booming and sorting of such logs." And the part of said finding excepted to is excepted to for the reason that the same and the whole thereof, is contrary to the evidence and is against the evidence, and is contrary to the law, and the said part of said finding excepted to, is found on lines numbered 33 and ends on line 38 with and including the word logs, and commences with the word The, being the third line from the end of said line 33 of said finding of fact No. five.

3.

Plaintiff excepts to all that part of finding of fact numbered nine, which part excepted to reads as follows, to wit:—

"Up to that time no structure of any kind had been erected by plaintiff within the limits of the territory so located on and occupied by the defendant, nor was any part of said territory in actual occupation by the plaintiff," and plaintiff excepts to the same and

the whole thereof, for the reason that the same and the whole of said part excepted to is contrary to the evidence and is against the evidence, and is contrary to the law, and the part of said finding of fact No. nine excepted to commences with the word Up on line numbered 10 or the tenth line of said finding of fact and ends with and including the word plaintiff on the 13th line of said finding of fact No. nine.

4.

Plaintiff excepts to all that part of finding of fact numbered ten, which reads as follows, to wit:

"There is a gap between this sheer boom and the upper
540 dolphin of the main boom sufficiently wide for the passage of such water craft as ply on the river" and plaintiff excepts to the same and the whole thereof for the reason that the same and the whole of the part excepted to is contrary to and is against the evidence and is contrary to the law.

Plaintiff also excepts to all that part of finding of fact No. ten, which reads as follows, to wit:

"Defendant purposes to accomplish this result by connecting the sheer boom with the upper dolphin of the main boom through the agency of a boom stick. The logs coming down the river on the left hand side would thereby be shunted into the mouth of the main boom of defendant." And plaintiff excepts to the same and the whole said *said* part of said finding of fact No. ten above set out for the reason that the same and the whole thereof, is contrary to and against the evidence and is contrary to the law.

Plaintiff also excepts to all that part of said finding of fact No. ten, which reads as follows, to wit:

"about 15 feet from the bank," and the same is excepted to for the reason that the same and the whole thereof is contrary to and is against the evidence and is contrary to the law *law,* and the said words "about 15 feet from the bank," above excepted to are the last four words of the 6th line and the first words of the 7th line of said finding of fact No. 10.

5.

Plaintiff excepts to finding of fact No. 12 and the whole thereof, for the reason that the same and the whole thereof, is contrary to and is against the evidence and is contrary to the law.

541

6.

Plaintiff excepts to finding of fact numbered thirteen and the whole thereof, for the reason that the same and the whole thereof is contrary to the evidence and is against the evidence, and is contrary to the law.

7.

Plaintiff excepts to all of finding of fact No. fourteen excepting the first two lines thereof, and the part of the said finding of fact No. 14 excepted to, is all of the last five lines of said finding of fact, and the same and the whole of said part hereby excepted to, is contrary

to the evidence and is against the evidence, and is contrary to the law.

8.

Plaintiff excepts to finding of fact No. 15 and the whole thereof, for the reason that the same and the whole thereof, is contrary to the evidence and is against the evidence and is contrary to the law.

9.

Plaintiff objects to finding of fact numbered sixteen and the whole thereof, for the reason that the same and the whole thereof is contrary to, and is against the evidence, and is contrary to law.

10.

Plaintiff excepts to finding of fact numbered seventeen and the whole thereof, for the reason that the same and the whole thereof, is contrary to the evidence and is against the evidence and is contrary to law.

11.

Plaintiff excepts to finding of fact numbered eighteen and to the whole thereof, for the reason that the same and the whole
542 thereof, is contrary to the evidence and is against the evidence and is contrary to the law.

Plaintiff excepts to the conclusions of law as follows:

1.

Plaintiff excepts to conclusion of law numbered one for the reason that the same and the whole thereof, is contrary to the law and is not the law, and the same is contrary to the evidence.

2.

Plaintiff excepts to conclusion of law numbered two for the reason that the same and the whole thereof, is contrary to, and is against the law, and is not the law, and the same is contrary to the evidence.

3.

Plaintiff excepts to conclusion of law numbered three for the reason that the same and the whole thereof, is contrary to the law and is against the law, and the same is not the law, and the same is contrary to the evidence.

4.

Plaintiff excepts to conclusion of law numbered four for the reason that the same and the whole thereof, is contrary to the

law and is against the law, and the same is not the law, and the same is contrary to the evidence.

Dated and filed this 14th day of March 1904.

W. B. STRATTON,
WELSH BROS. AND
WM. H. GUDGEL,
Attorneys for Plaintiff.

543 Service of the foregoing exceptions is admitted this 14th day of March 1904.

H. W. B. HEWEN,
W. H. ABEL, AND
R. W. RUFFIN,
Attorneys for Defendant.

Filed Mar. 14, 1904.
E. A. SEABORG,
County Clerk,
By M. H. CARMICHAEL, *Deputy.*

544 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff,
vs.
NORTH SHORE BOOM AND DRIVING COMPANY, Defendant.

Plaintiff's Exceptions to the Judgment.

Comes now the plaintiff in the above entitled action, and excepts to the final judgment made and entered in the above entitled action, and to the whole of said judgment for the following reasons:

1.

Because said judgment and the whole thereof is not supported by the evidence and testimony, and is contrary to and against the evidence and testimony.

2.

Because said judgment and the whole thereof, is contrary to the law, and the same and the whole thereof, is against the law.

W. B. STRATTON,
WELSH BROS., AND
WM. H. GUDGEL,
Attorneys for Plaintiff.

Service of the foregoing exceptions is hereby admitted this 14th day of March, 1904.

H. W. B. HEWEN,
W. H. ABEL, AND
R. W. RUFFIN,
Attorneys for Defendant.

Filed Mar. 14, 1904.
E. A. SEABORG,
County Clerk,
By M. H. CARMICHAEL, *Deputy.*

545 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff,
v.
NORTH SHORE BOOM AND DRIVING COMPANY, Defendant.

Order.

The above entitled action came on regularly for hearing in open court on this 2nd day of June, 1904, upon the motion heretofore filed herein, by the plaintiff to strike certain parts of the cost bill heretofore filed herein by the defendant. Welsh Bros. and W. H. Gudgel appeared as attorneys in behalf of plaintiff in support of said motion to strike, and H. W. B. Hewen, appeared as attorney for defendant, in opposition to said motion, and after argument of respective counsel, and after the court duly considered the matter, it is hereby ordered and adjudged as follows:

That said motion be overruled, and said cost bill allowed to stand as filed, excepting that there be stricken from said cost bill the following items, and no more, towit:

That the item charged in said cost bill in the sum of five dollars, for a certified copy of a plat filed in the office of the secretary of state by plaintiffs, be stricken, and disallowed;

And that the item of five days and 20 miles twice in the sum of $14.00 for witness Paul Nelson, be reduced to ten dollars:

546 And that the item charged in the sum of $26.80, for witness S. D. Wentworth, be reduced to $24.80;

And that the item of $19.00 charged for witness W. W. Williams be reduced to seven dollars.

It is further ordered that with the exceptions of the items herein above particularly specified, that plaintiff's cost bill stand as filed, leaving plaintiff's cost bill in all amounting to the sum of $389.65) three hundred eighty-nine and 65/100 dollars.

Pl'ff and Def't each excepts and exceptions allowed.

Done in open court this 3 day of June 1904.

A. E. RICE, *Judge.*

Filed Jun- 3, 1904.
E. A. SEABORG,
County Clerk.

Recorded Court Journal Vol 11, page 84.

547 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM CO. (a Corporation), Plaintiff,
versus
NORTH SHORE BOOM AND DRIVING COMPANY (a Corporation), Defendant.

Notice of Appeal.

To the North Shore Boom and Driving Company, (a corporation) the defendant in the above entitled action; and to H. W. B. Hewen, W. H. Abel and R. W. Ruffin, attorneys for the above named defendants in the above entitled action:

You and each of you are hereby notified that the Nicomen Boom Co. the plaintiff in the above entitled action, hereby appeals to the supreme court of the state of Washington, from that certain final judgment and decree, which was made and signed in the above entitled action, in the above named superior court, on the 10th day of March, A. D. 1904, and filed in said action in the above named superior court on the 12th day of March A. D. 1904, and which said judgment was in favor of the defendant in the above entitled action and against the plaintiff in the above entitled action; and which said judgment and decree was and is in words and figures as follows, to wit:

548 In the Superior Court of the State of Washington in and for Pacific County.

No. 1501.

NICOMEN BOOM COMPANY, Plaintiff,
vs.
NORTH SHORE BOOM AND DRIVING COMPANY, Defendant.

Decree.

The court having on the 10th day of March, 1904, made and entered herein its findings of fact and conclusions of law based upon the evidence submitted to the court at the trial of the above entitled action, and the defendant having moved for judgment in its favor based upon its findings of fact *on* conclusions of law, and the court being now duly advised in the premises, said motion is hereby granted and it is therefore

Considered, ordered, adjudged and decreed by the court that the plaintiff take nothing by this action and that its application for an injunction against the defendant be and the same is hereby denied, and that this action be and the same is hereby dismissed; and that

the defendant have and recover of and from the plaintiff its costs and disbursements in this action to be taxed.

Done in open court this 10th day of March, 1904.

R. B. ALBERTSON, *Judge.*"

And the North Shore Boom and Driving Company, the defendant in the above entitled action is notified that the plaintiff in the above entitled action hereby appeals to the supreme court of the state of Washington from the whole and every part of said judgment and decree, and this appeal is from the whole and every part of said judgment and decree.

Dated this 4th day of June A. D. 1904.

549 NICOMEN BOOM CO., *Plaintiff,*

By W. B. STRATTON,
WILLIAM H. GUDGEL AND
WELSH BROTHERS,
Attorneys for Plaintiff.

W. B. STRATTON,
WILLIAM H. GUDGEL, AND
WELSH BROTHERS,
Attorneys for Nicomen Boom Co.,
Plaintiff in the Above-Entitled Action.

Service of the within and foregoing notice of appeal is hereby admitted at South Bend, Pacific County, Washington, this 4th day of June, A. D. 1904.

H. W. B. HEWEN,
W. H. ABEL,
RICHARD W. RUFFIN,
Attorneys for Defendant,
North Shore Boom & Driving Company.

Filed, June 6th, 1904.
E. A. SEABORG,
County Clerk.

550 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM COMPANY, Plaintiff,
vs.
NORTH SHORE BOOM AND DRIVING COMPANY, Defendant.

Bond on Appeal.

Know all men by these presents, that the Nicomen Boom Co., a corporation, the plaintiff in the above entitled action, as principal and P. J. McGowan and H. S. McGowan as sureties all of Pacific County, Washington, are held and firmly bound unto the North Shore Boom and Driving Company, a corporation, the defendant in the above entitled action, in the penal sum of twelve hundred

dollars, lawful money of the United States of America, for the payment of which well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators and successors, firmly, jointly and severally by these presents.

Signed, sealed and dated this 4th day of June, A. D. 1904. The condition of this obligation is such, that whereas a certain final judgment and decree was signed in the above entitled action on the 10th day of March, 1904, and was filed and entered in said action on the 12th day of March, 1904, and

Whereas, the said plaintiff the Nicomen Boom Co., a corporation, has appealed from said final judgment and decree of the supreme court of the state of Washington;

Now, therefore, if the said plaintiff and appellant, Nicomen
551 Boom Co., will pay to the said North Shore Boom and Driving Company, a corporation, the defendant in the above entitled action all costs and damages that may be awarded against said plaintiff and appellant, Nicomen Boom Co. on said appeal or on the dismissal thereof not exceeding two hundred dollars; and further will pay and satisfy and perform the judgment or order appealed from in case it shall be affirmed and any judgment or order which the supreme court may render or make, or order to be rendered or made by the supreme court from which the appeal is taken, then this obligation to be null and void, otherwise to be and remain in full force and effect.

NICOMEN BOOM CO.,
By P. J. McGOWAN, *President.*

Attest: H. S. McGOWAN, *Secretary.*

P. J. McGOWAN, *Surety.*
H. S. McGOWAN, *Surety.*

[Seal Nicomen Boom Co., South Bend, Wash., Incorporated March 21, 1900.]

Signed, sealed and delivered in presence of
E. P. NOONAN.
N. B. SHERMAN.

552 STATE OF WASHINGTON, *County of Pacific, ss:*

P. J. McGowan and H. S. McGowan each being first duly sworn, on his oath each for himself deposes and says: that he is the surety who signed and executed the within and foregoing bond; that he is a resident of Pacific County within the state of Washington; that he is worth the sum of twenty-four hundred dollars over and above all debts and liabilities, in property situate within the state of Washington, and exclusive of property exempt from execution.

P. J. McGOWAN.
H. S. McGOWAN.

Subscribe- and sworn to before me this 4th day of June, 1904.
[Seal of E. P. Noonan, Notary Public, State of Washington.]

E. P. NOONAN,
Notary Public for Washington, Residing at McGowan, Pacific Co., Washington.

Commission expires Dec. 4 1905.

The within bond filed this 6th day of June, 1904.

E. A. SEABORG,
County Clerk.

Filed June 6th, 1904.
E. A. SEABORG, *County Clerk.*

Recorded Court Journal, Vol. 11, page 87.

553 In the Superior Court of the State of Washington, in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff and Appellant,
vs.
NORTH SHORE BOOM AND DRIVING COMPANY, Defendant and Respondent.

Notice of Filing of Bond on Appeal.

To North Shore Boom and Driving Company, the defendant in the above entitled action; and to H. W. B. Hewen, W. H. Abel, and R. W. Ruffin, the attorneys for said defendant:

You and each of you, are hereby notified that on the 6th day of June A. D. 1904, the plaintiff and appellant Nicomen Boom Co., filed in the office of the clerk of the above named court, its bond on appeal in the above entitled action; and that said bond is now on file in the office of the clerk of said court; and that you are herewith served with a certified copy of said bond.

W. H. STRATTON,
WELSH BROS., AND
WM. H. GUDGEL,
Attorneys for Plaintiff and Appellant, Nicomen Boom Co.

554 Service of the foregoing notice, and also of a certified copy of the bond filed on June 6th, 1904, by the plaintiff and appellant in the above entitled action, is hereby admitted this 8th day of June, 1904.

H. W. B. HEWEN,
W. H. ABEL,
Attorneys for Defendant and Respondent, North Shore Boom and Driving Company.

Filed June 9, 1904,
E. A. SEABORG,
County Clerk.

Filed Aug. 16, 1904,
E. A. SEABORG,
County Clerk.

555 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant.

Notice of Filing Statement of Facts.

To the above named defendant in the above entitled action, namely to, the North Shore Boom & Driving Company, and to H. W. B. Hewen, and W. H. Abel, and R. W. Ruffin, the attorneys for said defendant:

You and each of you are hereby notified that the foregoing statement of facts is the statement of fact which the plaintiff proposed and proposes and filed in the above entitled action, prior hereto, and prior to the service of this notice, and of the service of the foregoing attached statement of facts upon you, and that the same is plaintiff's proposed statement of facts.

Respectfully submitted,

W. B. STRATTON,
WELSH BROS, AND
WILLIAM H. GUDGEL,
Attorneys for Plaintiff, Nicomen Boom Co.

556 Service of the foregoing notice is hereby admitted this 31st day of May 1904, at the hour of 12 o'clock and 20 minutes past noon of said day.

W. H. ABEL,
H. W. B. HEWEN,
RICHARD W. RUFFIN,
Attorneys for Defendant.

Filed May 31, 1904, at 8-30 A. M.
E. A. SEABORG,
County Clerk.

557 In the Superior Court of the State of Washington, in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff,
vs.
NORTH SHORE BOOM AND DRIVING COMPANY, Defendant.

Admission of Service of Statement of Facts.

Service of the within and foregoing statement of facts is hereby admitted and copy received this 31st day of May 1904 at 20 minutes past 12 o'clock noon of said day, and after said statement of facts

were filed and marked filed in the above entitled action by the clerk of the above named superior court.

W. H. ABEL,
H. W. B. HEWEN,
RICHARD W. RUFFIN,
Attorney for Defendant, North Shore Boom & Driving Company.

Filed May 31, 1904.
E. A. SEABORG,
County Clerk.

558 In the Superior Court of the State of Washington, in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff and Appellant,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant and Respondent.

Notice.

To the North Shore Boom and Driving Company, defendant and respondent above named and to H. W. B. Hewen and W. H. Abel, its attorneys:

You and each of you are hereby notified that on the 16th day of August A. D. 1904, at the hour of ten o'clock in the forenoon of said day at the court room of the court house of the above named superior court in the city of South Bend, Pacific County, Washington, the Nicomen Boom Co., plaintiff and appellant in the above entitled action will apply to the Hon. R. B. Albertson, Judge of the above named superior court and the judge who tried the above entitled action to settle and certify the statement of facts in said action, and at said time and place the proposed statement of facts and bill of exceptions heretofore filed herein by the plaintiff said Nicomen Boom Company, and also the amendments proposed thereto by defendant, North Shore Boom & Driving Company, will be presented to said judge of said superior court for settlement, and at said time and place said judge of said superior court will settle and
559 certify the statement of facts in said action.

W. B. STRATTON,
WELSH BROS., AND
WILLIAM H. GUDGEL,
Attorneys of Nocomen Boom Co., Plaintiff and Appellant, residence and address, South Bend, Pacific County, Washington.

NICOMEN BOOM CO.,
Plaintiff and Appellant.
By JOHN T. WELSH,
One of its Attorneys.

Service of the within notice by copy admitted at South Bend, Wash. this 9th day of August, 1904.

W. H. ABEL,
H. W. B. HEWEN,
Attorneys for Defendant and Respondent.

Filed Aug. 9, 1904,
E. A. SEABORG,
County Clerk,
By C. M. HUNTER, *Deputy.*

560 In the Supreme Court of the State of Washington.

THE NICOMEN BOOM CO., Plaintiff and Appellant,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant and Respondent.

Stipulation Extending Time in which to File Briefs.

It is hereby stipulated and agreed by and between the above named parties, by their respective attorneys that the said plaintiff and appellant have 120 days from the date of filing of the notice of appeal in said cause, in which to serve and file its brief and that defendant and respondent have 60 days after the service on it of plaintiff and appellant's brief, in which to serve and file its brief.

Witness our hands, this 16th day of August, 1904.

W. B. STRATTON,
WELSH BROS., AND
WM. H. GUDGEL,
Attorneys for Plaintiff and Appellant.
H. W. B. HEWEN AND.
W. H. ABEL,
Attorneys for Defendant and Respondent.

Filed Aug. 16, 1904.
E. A. SEABORG,
County Clerk.

561 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM CO., Plaintiff,
vs.
NORTH SHORE BOOM AND DRIVING COMPANY, Defendant.

STATE OF WASHINGTON, *County of Pacific, ss:*

I, E. A. Seaborg, county clerk and *ex-officio* clerk of the superior court of the state of Washington, in and for the county of Pacific,

do hereby certify that the foregoing is a full, true and correct transcript of so much of the record and files in the above entitled cause as I have been directed by the appellant to transmit to the supreme court.

In testimony whereof, I have hereunto set my hand and the seal of said superior court this seventh day of August, A. D. 1904.

E. A. SEABORG,
County Clerk and ex-Officio Clerk of the Superior
[SEAL.] *Court of the State of Washington for Pacific County.*

Transcripts of record.
Filed Aug. 17, 1904.
E. A. SEABORG,
County Clerk.

562 In the Superior Court of the State of Washington for Pacific County.

NICOMEN BOOM COMPANY, Plaintiff,
vs.
NORTH SHORE BOOM & DRIVING CO., Defendant.

To the above named defendant and its attorneys, H. W. B. Hewen and W. H. Abel:

You will please take notice that the depositions of J. M. Clapp, J. S. Brace, H. W. Hamilton and Frank Herbert, witnesses on behalf of the plaintiff in the above entitled action, to be used upon the trial thereof, will be taken before P. V. Davis Esq., a notary public in and for the state of Washington, at his office in the city of Seattle, King county, Washington, the same being at number 534 Pioneer Building in said city, on the 24th day of November, 1903, commencing at the hour of nine o'clock A. M. of said day, and if not completed on that day, the taking thereof will be continued from day to day, successively thereafter, and over Sundays at the same place until completed.

You will further take notice that the annexed is a copy of an affidavit of W. B. Stratton, one of the plaintiff's attorneys, showing that this case is one in which a deposition may be taken, and in which depositions may be taken.

Yours, etc.,
WELSH BROS.,
W. B. STRATTON, *Pl'ff's Att'ys.*

STATE OF WASHINGTON, *County of Thurston, ss:*

W. B. Stratton being first duly sworn, on oath deposes and says: That each and every one of the witnesses whose names are set forth in the above and foregoing notice reside outside of the county of Pacific, Washington, and more than twenty miles
563 from the place of trial of said action.

W. B. STRATTON.

Subscribed and sworn to before me this 18th day of November, 1903.

C. S. REINHART,
Clerk of the Supreme Court, Washington.

Service of the foregoing motion and affidavit this 18th day of November, 1903.

H. W. B. HEWEN,
W. H. ABEL,
[SEAL.] R. W. RUFFIN,
Defendant's Attorneys.

564 It is hereby stipulated and agreed by and between the parties hereto that the deposition of J. S. Brace may be taken in shorthand by Mrs. P. M. Harris and extended in long hand and when so extended, shall be taken as the evidence of said J. S. Brace, without their signatures thereto.

W. B. STRATTON,
Of Att'ys for Pl'ff.
RICHARD W. RUFFIN,
For Defendant.

By P. V. DAVIS:—

Pursuant to the notice hereto attached, personally appeared before me, J. S. Brace, at my office, at No. named in the notice hereto attached, and being first duly sworn, on oath, testified as follows, upon this 24th day of November, A. D. 1903.

By W. B. STRATTON, Attorney for Plaintiff:

Q. State your name and age.
A. J. S. Brace, forty-two.
Q. What is your occupation?
A. Lumber manufacturer.
Q. At what place?
A. Seattle, Washington.
Q. How long have you been in the lumber business?
A. In the state of Washington, twenty years.
Q. Have you had any experience in logging in the state of Washington?
A. Yes.
Q. How many years of such experience have you had?
A. I have been connected with the logging part of the business principally during all the time I have been in the mill business.
Q. How long is that?
A. Twenty years in this state.
Q. During that time have you had any cause to note the number of thousand feet of logs that would occupy a given area?
A. Yes.
565 Q. State whether or not you are familiar with the size of timber and logs in the western part of the state of Washington.
A. Yes.

Q. Are you familiar with the size of timber and logs in southwestern Washington?

A. Yes.

Q. You may state some of your observations—where made—and give your method of arriving at the number of feet of logs such as are usually out in western Washington in a given area.

A. I have had occasion to scale logs in western Washington several times and find that the average run of logs usually scale about forty thousand feet to a section as a section as known in western Washington is contained in four boom sticks, each sixty-four feet long leaving the space occupied by forty thousand feet of logs about sixty feet square—the whole area covered by the logs and boom sticks would occupy about sixty-four feet square.

Q. Please reduce this measurement to a unit basis—say the area is a water area—how many feet of logs would be contained in an acre?

A. An acre would contain a little more than ten sections and a section averages about forty thousand feet, it would make a little more than four hundred thousand feet.

Q. How are these logs laid in the section?

A. Perfectly straight, close together, parallel with each other.

Q. State wh-ther or not you have observed, whether you know the number of feet of logs usually contained in a section the size of which you have named and in an acre made up of sections the size of which you have named?

A. I know the number of logs contained in a section and only from computing the number of sections stored on an acre do I know the number in the acre. It is a question of figures.

Q. You may state whether or not you have logs stored at this time in your booms at Seattle?

A. Yes.

566 Defendants by their attorney, Richard W. Ruffin, object to these questions as incompetent, irrelevant and immaterial, for the reason that the witness has not shown such a knowledge as would entitled him to testify as an expert in the particular locality of the Nicomen Boom Company or the North Shore Boom and Driving Company, located in Pacific County, Washington.

It is stipulated by the parties hereto that the objection so taken, shall apply to each question heretofore asked the witness.

Q. State whether or not in your opinion, an acre of boom area where logs come into the boom down the river and where the boom contains several acres, would hold as many logs as an acre of raft area?

A. My experience in catching logs in a river has been that you catch about twenty-five per cent. drift with the logs and the logs always lie criss cross when caught in a boom, before they are sectioned up, therefore logs caught in a river would occupy, considering the fact of their not being boomed up and the drift, about forty to fifty per cent. more space than they would after they have been sorted out and sectioned up.

Q. Then, according to your last statement, what would be a reasonable average, how many thousand feet, of logs would be a reasonable average number of feet that would be caught in a boom as the logs come down the river, per acre?

A. About three hundred to three hundred and fifty thousand feet, in my judgment, would be the catching capacity of a boom.

Q. Upon what do you base your statement, what facts do you take into consideration?

A. Upon the facts of the average number of feet of logs contained in a section which is of a known size and upon the fact that logs, before they are sectioned up, cover considerable more space than
567 after they are sectioned up and straightened out and from the fact that a river boom, in my experience, has always caught considerable drift with the logs.

Defendants, by their attorney, Richard W. Ruffin, object to the latter part of that answer and ask that it *to* be stricken out as it does not apply to the North river and therefore is incompetent and immaterial.

Q. State whether or not, from your knowledge of timber and log south of Gray's Harbor, the figures you have just given would apply to logs cut in that vicinity and floated down North river?

A. I think that the logs are about the same size as logs that I have been handling on Puget Sound and the same average.

Defendants, by their attorney, Richard W. Ruffin, object to the answer, and ask that it be stricken out as not responsive.

By Mr. STRATTON:

Mrs. Stenographer please read the question to the witness leaving out the last part with reference to the North river.

(Question read.)

A. Yes, logs are about the same size.

Q. What do you consider the diameter to be of an average log thirty feet long at the small end?

A. About twenty-six inches.

Q. How many feet would such a log scale using the Standard scale for measurement, such as is used in the state of Washington?

A. Nine hundred and seven feet.

Q. What, in your judgment, would be a fair average scale of logs occupying an acre of water area in a tidal river where the range of tide varies from eight to fourteen feet and in which the flood current overcomes the river current and gives a reverse current of say a mile an hour, that is where the logs are caught in a boom?

A. Three hundred and fifty thousand feet.

Q. State whether or not logs would loosen a little and
568 would occupy more space under the circumstances you have just named, or if the current were all one way would they remain practically immovable?

Defendants, by their attorney, Richard W. Ruffin, object to the question as leading.

A. More logs would be held on an acre where the current was all one way.

Q. Why is this?

A. The backward current has a tendency to loosen up the logs and allow them to separate and spread out and where the current is all one way they keep crowding and pack close together, nearly as close as if they were packed by hand.

Q. Have you ever observed logs which come down with the current or during a freshet packed two or three deep at the lower end of the boom?

A. I have.

Q. Now when the tide turns and the current turns what happens?

A. They loosen up.

Q. What about the space?

A. They would occupy more space.

Q. What is the nature of the drift, if you know, that comes into a boom from the upper river during times of a freshet?

A. Whole trees, stumps, cord wood, shingle bolts and, if it is in a settled country, pig pens, barns and all sorts of things, but mostly stumps, shingle bolts and cord wood.

Q. Does this cause any difference in the storage capacity of a boom for logs?

A. It occupies just that much space.

Q. You may explain whether a stump would occupy more space than a saw log?

A. Any piece of timber with branches would occupy more space than a saw log which is supposed to be clear of roots and branches, the whole tree is usually torn up by the roots and has most of its branches and roots intact and as it floats down the river every
569 part of it occupies space.

Q. And I suppose the position of an old stump or tree with roots and branches in the boom would to some extent cover the amount of log space that it would nullify?

A. Yes.

Q. Suppose that with these logs, roots, trees and stumps are to be crowded into a boom having a width say of one hundred feet at low tide and not to exceed two hundred feet at high tide at a point say half way between the lower and upper part of the boom, what would occur?

Defendants, by their attorney Richard W. Ruffin, objects to this question as incompetent and calls for a supposition of the witness.

A. It would be very apt to form a jam, logs would pile up on it and leave a clear space of unoccupied booming ground below it, down stream.

Q. I think you have already answered the question but you may answer this one, namely, what, in your opinion, is a fair estimate of the amount of logs that would be stored in a river boom per acre, used to catch logs where they can be rafted in tide water when the freshets have subsided or lowered, taking into consideration all manner of drift which may be found to enter such a boom.

Defendant, by their attorney, Richard W. Ruffin, object to the question as incompetent, irrelevant and immaterial.

A. I think that about three hundred to three hundred and fifty feet per acre is the catching capacity of such a boom but you also mention storage capacity, which would be somewhat greater as the logs would be sorted and packed away by hand when sorted.

Q. Now assuming that a boom has a water area of twelve and eighty-five one hundredths acres, how many feet of logs in a tidal river, would that boom reasonable accommodate?

A. That is simply a question of figures on the line of my former answer, but it would accommodate somewheres in the neighborhood of four million feet.

570 Q. Assuming that the boom just mentioned contains a water area of sixteen and fifty-two-one-hundredths acres what would be a reasonable capacity?

Defendants, by their attorney, Richard W. Ruffin, object to the question as incompetent, irrelevant and immaterial.

A. Same answer as to the last applies to that. It is a question of computing from three hundred to three hundred and fifty feet to the acre, which makes somewhere in the neighborhood of five million feet.

Q. Assuming that a boom, or a branch of a boom, contains seventeen and twenty-one one-hundredths acres what would be the reasonable capacity of that boom? How would you compute it?

Defendants, by their attorney, Richard W. Ruffin, object to the question as incompetent, irrelevant and immaterial.

A. I would compute it at the rate of from three hundred to three hundred and fifty feet per acre it would depend on the amount of drift usually running in that river and the strength of the current and so on.

Q. Now what would you say as to the safety of a storing boom to its full capacity on a tidal river where the tide raises and lowers as mentioned in one of my former questions?

A. Booms can be so constructed so that it is safe to store them to their full capacity, but they are not usually. A catching boom is not usually depended on to store logs in as they are not considered strong enough or safe.

Q. Why are they not considered safe?

A. The catching boom has to be out in the current and the current sometimes gets very strong and would break almost any boom therefore a boom to be strictly all right ought to have a dead water storage connection of some kind.

Q. What, if anything, can you say respecting the wedging of logs coming down into a boom, against the piles which are the outer structure of the boom?

A. They sometimes wedge in very strong and push the piles over.

571 Q. Assuming that a boom in a tidal river contains twenty and sixty-six one-hundredths acres, what would be a reasonable catching capacity of that boom?

Defendants, by their attorney, Richard W. Ruffin, object to question as incompetent, irrelevant and immaterial.

A. A little more than seven million feet.

Q. Then if the width of the boom you have just named was increased twenty-five per cent. the reasonable catching capacity would be increased twenty-five per cent. would it not?

A. I think a little more than twenty-five per cent.

Q. Is there any other fact you can state in connection *to* this testimony to make yourself clearer.

A. Not unless you can let me make myself competent to answer these questions.

Q. Have you had any other experience in booming logs Mr. Brace, than that *that* you have already named?

A. Yes.

Q. Where did you have that experience and what was it?

A. At Spokane in the Spokane river, we had a boom there for catching and storing logs.

Defendants, by their attorney, Richard W. Ruffin, object to question and answer and ask to have *it* stricken out.

Q. How long ago was it?

A. About fourteen years.

Defendants, by their attorney, Richard W. Ruffin, object to the question and answer *is* incompetent, irrelevant and immaterial, and ask to have them stricken out.

Q. You may state how many feet of logs annually were caught in this boom you named in Spokane county?

A. Somewhere in the neighborhood of five million feet to the best of my recollection.

Defendant-, by their attorney, Richard W. Ruffin, object to the question and answer as incompetent, irrelevant and imma-
572 terial and ask to have them stricken out.

Q. In what capacity were you employed about that boom?

A. Superintendent.

Defendant-, by their attorney, R. W. Ruffin, objects to the question and answer, as incompetent, irrelevant and immaterial and asks to have them stricken out.

Q. State whether or not your testimony to some extent is based upon the knowledge of booming logs which you acquired in operating this boom in Spokane county.

A. The testimony in regard to drift and packing of logs is based on that experience and of booming logs in currents.

Q. Is there any other statements which you can make that will aid

in showing any facts in connection with booming logs which are material in this case?

A. I do not know of any.

Witness cross-examined by Mr. RUFFIN, Attorney for Defendants:

Q. Mr. Brace, are you acquainted with Mr. P. J. McGovern?

A. I am not.

Q. Are you acquainted with any one of his sons?

A. Not to my knowledge.

Q. Are you acquainted with any of the officers, directors or stockholders of the *of the* Nicomen Boom Company?

A. Not that I know of, not to my knowledge.

Q. Are you acquainted with the North river in Pacific County?

A. I am not.

Q. Are you acquainted with the conditions in that river as to whether there is any drift wood?

A. I am not.

Q. Or the character of the logs that are boomed in that river?

A. I know the character of that timber by riding through it on the train and the timber in southwestern Washington generally.

Q. Are you acquainted with the character of the logs that are now being stored in that river or boomed or rafted?

573 A. No.

Q. Or at any time have been?

A. No.

Q. Mr. Brace, as a matter of fact, in a boom, take a boom on a river, is it true, or not, that the logs at the lower end of the boom will pile up many deep in deep water where there is a current?

A. Not many deep. I have seen them pile two deep and in extraordinary cases three deep.

Q. Now in event that they piled to that extent with the tide turning, if the boom was full would the logs swell in such a way as to break the boom, or require more catching capacity?

A. I think not. It would not require more catching capacity and I don't think it would swell and break the boom.

Q. Is it customary for logs to swell up where there is a current?

A. I haven't seen them swell up very much.

Q. But you do not know as to the conditions of North river?

A. No. Not as to North river.

Q. Have you ever measured logs in the manner in which you testified to here Mr. Brace, in booms?

A. Yes.

Q. In what way?

A. Scaling them to buy them.

Q. Did you ever in doing so take into account the area as to acres they were lying on?

A. I took into account the area as to feet square as they laid in the boom.

Q. Where were they?

A. In Puget Sound, Lake Washington and Lake Union.

Q. You have never measured logs in a boom as to area in a river?
A. In eastern Washington, yes, in Spokane river.
Q. What are the conditions in Spokane river?
A. The logs are about the same in diameter but cut in shorter lengths than what is customary in western Washington.

574 Q. What is the size of that river?
A. Where we caught the logs, it is about five hundred feet wide and ten feet deep.
Q. What is the condition of the current?
A. Very swift.
Q. Have you any interest in this litigation, Mr. Brace?
A. Not at all. Do not know the parties to my knowledge, of course might happen to know some man who might happen to have some stock in some of these boom companies or something of that nature, but I don't know that I do.
Q. Who solicited your testimony?
A. Mr. Clapp asked me if I personally knew anything about the areas of logs in regard to the number of feet?
Q. Who is Mr. Clapp?
A. Mr. Clapp is in the war department.
Q. What are his initials?
A. I do not believe I know.
Q. How long ago was it that he spoke to you?
A. I do not believe that he asked me to testify, but asked me if I knew anything about the number of feet contained in different areas of logs.
Q. Did he mention anything about this company or about this litigation?

Plaintiffs, by their attorney, W. B. Stratton, objects to the question as incompetent, irrelevant and immaterial.

A. He told me there was some litigation in connection with some boom grounds but I don't remember his mentioning the name of the company excepting that it was over in Gray's Harbor country.
Q. Did he state whether or not he was interested in the matter?
A. He did not.
Q. Was he the only person who spoke to you about it prior to today?
A. Yes.

575 Question by W. B. STRATTON:

Q. Did not Mr. Dalton telephone you at my request some days ago in relation to your testimony?
A. Not to my recollection. I think Mr. Dalton telephoned me this morning asking if I would be here today.
Q. You say Mr. Clapp did not ask you to testify in this case?
A. Yes, I supposed he wanted to know whether or not I knew anything about the matter, but I thought he was asking for his own information.
Q. Then so far as to anything that Mr. Clapp said you did not know but what he was asking for information for himself?

A. I did not.
Q. He did not say he was going to be a witness in this case?
A. He did not.
Q. Did Mr. Clapp in any of his talks with you ever show any interest or show that he was particularly interested in either side winning?
A. No, I did not know what side he was on, or that he was interested at all in the winning of the case, but Mr. Clapp seemed anxious to inform himself in relation to the booming area in booming waters.
Q. Mr. Clapp might have been anxious to get the information for himself?
A. I thought he was.
Q. You did not know that Mr. Clapp wanted the information for himself?
A. Yes, from my own opinion I thought so.

Question by Mr. RUFFIN:

Q. Did he state that he wanted the information for the war department?
A. No, I supposed that he wanted it for himself.
Q. What caused you to change your mind?
A. The fact that he mentioned later that there was some litigation regarding to a boom matter.
Q. Has any other person talked with you, Mr. Brace?
A. No other person, not even the attorneys until this afternoon.

576 Question by Mr. STRATTON:

—. As a matter of fact you never talked this matter over with me or Mr. Dalton before this morning when Mr. Dalton called you up and asked if you make this deposition?
A. Yes, that is the first I talked with the attorneys.

Taking of depositions adjourned until to morrow, of the other witnesses.

J. S. BRACE.

I, P. V. Davis, a notary public in and for the state of Washington residing at Seattle, do hereby certify that the above deposition was taken by me and reduced to writing pursuant to the stipulation hereto attached at my office in Seattle, in said county, on the 24th day of November, A. D. 1903, at the time and place in pursuance to said notice hereto attached; that the above named witness, before examination, was sworn to testify to the truth, the whole truth and nothing but the truth, and that said deposition was carefully read to said witness after it was extended in long hand and then subscribed by him.

P. V. DAVIS,
Notary Public in and for the State
[SEAL.] *of Washington, Residing at Seattle.*

Dated November 25th, 1903.

Indorsed: This deposition filed Nov. 30th, 1903, and published this 1st day of December, 1903. E. A. Seaborg, County Clerk.

577 Before the Board of County Commissioners of and for the County of Pacific, State of Washington.

Comes now the undersigned remonstrancers, and make and file this remonstrance and remonstrate and object to the North Shore Boom and Driving Company, making any of the improvements proposed to be made by it on or in North river or the waters thereof, in the state of Washington, as proposed by it in its articles of incorporation, or in its plat, which plat is now on file in the office of the secretary of state of the state of Washington, and remonstrate and object against said North Shore Boom and Driving Company, making any of said improvements or any improvements, whatever or at all in or on said North River or any of the waters of said North River, within the state of Washington.

In support of this remonstrance, your remonstrancers allege and show to your honorable body, and to all to whom it may concern, as follows, to wit:

1.

That the Nicomen Boom Company, is now and was at all of the times hereinafter in the remonstrance alleged, a corporation duly organized and existing under and by virtue of the laws of the state of Washington.

2.

That the North Shore Boom and Driving Company is a corporation duly organized and existing under and by virtue of the laws of the state of Washington.

3.

That North river is a stream of water situated within the state of Washington, and which said North river is affected by the ebb and flow of the tide, and is the stream of water proposed to be improved by said North Shore Boom and Driving Company.

4.

That each of your, the undersigned remonstrancers own certain lands which are situated within Pacific County, Washington, and which lands lie alongside and abutt on said North river, and
578 that the said lands owned by your remonstrancers are more than one-half of all the lands lying alongside and abutting on said North river, and are and comprise more than one-half of all the lands lying alongside and abutting on that portion of said North river proposed to be improved by said North Shore Boom and Driving Company.

Witness our hands at South Bend, Washington, this 1th day of September A. D. 1903.

NICOMEN BOOM CO.,
By P. J. McGOWAN, *President.*
P. McGOWAN.

Witnesses:
JOHN T. WELSH.
MARTIN C. WELSH.

Filed September 10th, 1903, at 10 min. past 2 o'clock 1903.

STATE OF WASHINGTON, *County of Pacific, ss:*

I, A. P. Leonard, auditor and *ex-officio* recorder of the county of Pacific, state of Washington, and custodian of the records and files thereof, hereby certify that the above and foregoing, is a full, true and correct copy of an instrument, and of the whole thereof, as the same appears in the files in my office.

Witness my hand and official seal this 3rd day of December, 1903.

A. P. LEONARD,
[SEAL.] *County Auditor.*

Indorsed: Pl'ff's Ex. N. E. H. P. Filed Dec. 4, 1905. E. A. Seaborg, County Clerk.

Remonstrance.

579 This indenture, made this 21st day of November, in the year of our Lord eighteen hundred and eighty seven,

Witnesseth, That Isaac Smith of Pacific County, Wash. Ter., party of the first part, for and in consideration of the sum of one ($1) dollar, silver coin of the United States of America, to him in hand paid by Patrick J. McGowan of the same county and territory, party of the second part, the receipt of which is hereby acknowledged, doth by these presents, remise, release, and forever quitclaim unto the said party of the second part, and to his heirs and assigns forever, all of the following described real estate, situated in Pacific county, Washington Territory, to-wit:

The lot five (5) of section twenty-six (26) in township fifteen (15) North Range ten (10) west, containing according to the government survey thereof, twenty-eight acres and forty seven hundredths of an acre (28-47/100).

Together with all and singular the tenements and hereditaments and appurtenances, belonging or appertaining thereto, and also all his estate, right, title, interest, possession, claim of dower, and homestead; and the rents, issues, and profits of, in and to said real estate.

To have and to hold the same to the said party of the second part, and to his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

ISAAC SMITH. [SEAL.]

Signed in presence of
MRS. F. C. DAVIS.
E. B. WOOD.

TERRITORY OF WASHINGTON, *County of Pacific, ss:*

This Certifies, that on this 21st day of November, 1887, before me, the undersigned, county auditor in and for said county and territory personally appeared the within named Isaac Smith who is
580 known to me to be the identical person described in and who executed the within instrument, and acknowledged to me that

he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto set my hand and official seal the day and year last above written.

E. B. WOOD,
Auditor Pacific County, Wash. Ter.

[Seal Commissioners Court, Pacific County, W. T.]

Recorded, November 21st A. D. 1887 at 3:30 o'clock P. M. at the request of P. J. McGowan.

TERRITORY OF WASHINGTON, *County of Pacific, ss:*

I, A. P. Leonard, auditor and *ex officio* recorder of the county of Pacific, state of Washington, and custodian of the records and files thereof, hereby certify that the above and foregoing is a full, true and correct copy of an instrument, and of the whole thereof, as the same appears on page 160 of volume "J" of Deeds, in my office.

Witness my hand and official seal this 3rd day of November, 1903.

[SEAL.] A. P. LEONARD,
County Auditor.

Indorsed: Plaintiff's Ex. M. Filed Dec. 3, 1903. E. A. Seaborg, County Clerk.

581 This Indenture, Made the sixth day of July A. D. one thousand eight hundred and eighty seven by and between Amos Smith and Ida M. Smith, his wife, of North river, county of Pacific, in the territory of Washington, grantors, parties of the first part, and Patrick J. McGowan of the county of Pacific, in the territory of Washington, grantee, party of the second part:

Witnesseth, That the said parties of the first part, in consideration of the sum of ten thousand ($10,000.00) Dollars to them paid by the said party of the second part, the receipt of which is hereby a-knowledged, do by these presents grant, bargain, and sell, convey and confirm, unto the said party of the second part, his heirs and assigns the following described lots, tracts or parcels of land lying and situate in the county of Pacific and Territory of Washington, to-wit:

All of lots five (5) six (6) seven (7) and the south east quarter of the south east quarter of section twenty-two (22). The lots five (5) six (6) and seven (7) of section twenty-three (23). The lots two (2) three (3) five (5) seven (7) eight (8) nine (9) and ten (10) of section twenty-six (26): the lots three (3) four (4) five (5) six (6) and the south west quarter of the south east quarter of section twenty seven (27) all in township fifteen (15) north of range ten (10) west of the Willamette Meridian and containing according to the government survey thereof 565-7/100 acres.

Also all of the Amos Smith donation land claim No. 37 Notification No. 1544 being parts of section twenty six (26) in township fifteen (15) north of range ten (10) west of the Willamette Meridian and containing one hundred fifty nine 78/100 acres (159-78/100).

Also the undivided one half interest in and to the south half of the Almoran Smith and Eunice Smith donation land claim Certificate No. 282, Notification No. 953 being parts of sections twenty-six (26) thirty-five (35) and thirty-six (36) in township fifteen (15) north of range ten (10) west of the Willamette Meridian.

To have and to hold the premises aforesaid, with all and
582 singular the rights, privileges, appurtenances and immunities thereunto belonging, or in any wise appertaining unto the said party of the second part, and unto his heirs and assigns forever; the said Amos Smith and Ida M. Smith hereby covenanting that they are lawfully seized of an indefeasible estate in fee, in the premises herein conveyed; that they have good right to convey the same—that the said premises are free and clear of any encumbrances done or suffered by them or those under whom they claim:—and that they will warrant and defend the title to the said premises, unto the said party of the second part, and unto his heirs and assigns forever, against the lawful claims and demands of all persons whomsoever.

In witness whereof, the said parties of the first part, have hereunto set their hands and seals this 6th day of July A. D. 1887.

AMOS SMITH. [SEAL.]
IDA M. SMITH. [SEAL.]

Signed, sealed and delivered in presence of
HOWARD ROSS.
E. B. WOOD.

TERRITORY OF WASHINGTON, *County of Pacific, ss:*

This Certifies that on this sixth day of July A. D. one thousand eight hundred and eighty seven, before me the undersigned county auditor in and for said county and territory personally appeared the within named Amos Smith and Ida M. Smith his wife whose names are subscribed to the foregoing instrument as parties thereto personally known to me to be the individuals described in and who executed the within deed and acknowledged that they executed the same freely and voluntarily and for the uses and purposes therein mentioned. And I do further certify that I made known to Ida M. Smith wife of the said Amos Smith the contents of the foregoing instrument and examined her separate and apart from her husband and upon said separate examination she acknowledged that she
voluntarily of her own free will and without the fear of or
583 coercion from her husband executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal Commissioner Court, Pacific County, W. T.]

E. B. WOOD,
Auditor, Pacific County, Washington Territory.

Recorded July 6th A. D. 1887 at 6:50 o'clock P. M. at the request of P. J. McGowan.

STATE OF WASHINGTON, *County of Pacific, ss:*

I, A. P. Leonard, auditor and *ex-officio* recorder of the county of Pacific, state of Washington, and custodian of the records and files thereof, hereby certify that the above and foregoing is a full, true and correct copy of an instrument and of the whole thereof, as the same appears on page 23 of Volume "J" of Deeds, in my office.

Witness my hand and official seal this 3rd day of December, 1903.

[SEAL.] A. P. LEONARD,
County Auditor.

Indorsed: Plaintiff's Ex. L. Filed Dec. 3, 1903. E. A. Seaborg, County Clerk.

584 P. J. McGowan, President. E. P. Noonan, Secretary.

Nicomen Boom Co.

Incorporated March 21, 1900.

McGOWAN, WASH., *April* 19, '02.

Mr. Dann Lynn, North River, Via South Bend, Wash.

DEAR SIR: Enclosed herewith we hand you check No. 19 for $50.65 in payment for your time check March 7th, to April 8th. We also enclose check No. 20 for $2.50, account of the extra day mentioned by you on receipt forwarded by Mr. Street.

We find that Mr. Street sent in a receipt from T. R. Billings for $57.30 account of wages up to April 8th. We cannot pay this until the time check has been turned in for time. Please ask Billings to forward his time check and we will send him check in payment of the amount.

We have received your letter of the 14th enclosing a list of the supplies turned over to you by Mr. Street.

All of the logs should be gotten out of the sloughs and off of the banks also, so far as practicable. All of the logs that can be gotten into the river by any reasonable means, should be brought in and boomed. Those down below that are impossible to get, must be left there for the present, but we would like to have you forward a count of these stray logs as soon as you can conveniently make it. We would like to have a list of the logs put in storage and the date or dates when the stored logs were received, so that this information will be ready for the figuring up of storage dues.

Referring to the sunken or partly sunken logs, particularly the hemlock. We think it would be a better plan to get as many of these ashore as is practicable on high tides, so that during the summer they could dry out enough to float in the fall. They could then be handled in the boom and rafted out.

Yours truly,

585 THE NICOMEN BOOM CO.,
Per H. S. McG., *Sec'y.*

Enclosures.

Indorsed: Plaintiff's Ex. K. Filed Dec. 2, 1903. E. A. Seaborg, County Clerk.

586 — — Cole, President, Seattle, Wash.
A. E. Cole, Secretary.
A. J. Cole, Manager, South Bend, Wash.

Cole Shingle Company,

Washington Red Cedar Shingles.

Seattle Office 22 Bailey Building,
Mill, South Bend, Washington.

SOUTH BEND, WASH., *Aug.* 22, 1903.

P. J. McGowan, McGowan, W'n.

DEAR SIR: Owing to some trouble we have had with our logging engine this week, we will be delayed nearly a week in getting your piling over to North river. Our engine got to foaming so we could not make the headway we figured on and in consequence it has put us nearly a week behind in our calculations. We regret this delay but it is unavoidable, and we will do our best to get some piling over to you by the 1st of the month at the latest. We have things working better now and do not look for any further delays.

Should you want any more piling please give all the time & notice possible so we may have ample time in which to get them out.

Y'rs truly,

A. J. COLE, *Manager.*

Indorsed: Pl'ff's Ex. J. Filed Dec. 2, 1903. E. A. Seaborg, County Clerk.

587 UNITED STATES OF AMERICA, *State of Washington:*

Department of State, Olympia.

No. 4955.

Whereas, Nicomen Boom Co., a corporation, organized and existing under the laws of the state of Washington, and having its principal place of business at So. Bend, in said state, having complied with the requirements of Section 5 of an act of the Legislature of the State of Washington, approved March 13, 1897, entitled "An Act fixing the fees to be paid to the Secretary of State by corporations doing business in this state, and declaring an emergency," by paying to the Secretary of State, for License Fee $10, for penalty $2.50,

Now, therefore, a license is hereby granted to the above named company to carry on business in the State of Washington for the year ending June 30, 1904.

In testimony whereof I have hereunto set my hand and affixed the seal of the State of Washington, this 21st day of July, 1903.

SAM H. NICHOLS,
Secretary of State.

[SEAL.]

Indorsed: Plaintiff's Ex. I. Filed Dec. 2, 1903. E. A. Seaborg, County Clerk.

(Here follow maps marked pages 588 and 589.)

State Log Scale.

Diameter in inches

Length in feet	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52
16	135	177	200	225	253	280	309	340	372	407	444	482	522	564	607	653	701	750	799	849	901	959	1010	1017	1136	1186	1244	1313	1378	1496	1520	1594	1670	1747	1828	1909	1992
18	175	199	225	253	284	315	347	382	419	458	499	542	587	634	683	734	788	843	899	955	1014	1074	1136	1200	1266	1334	1405	1477	1551	1627	1710	1789	1878	1966	2056	2148	2242
20	194	221	250	281	316	351	386	425	466	509	555	603	653	705	759	816	876	937	999	1062	1126	1195	1263	1334	1407	1483	1561	1641	1723	1805	1890	1978	2067	2157	2250	2345	2442
22	214	243	274	309	345	386	424	467	512	559	610	663	718	775	835	898	964	1031	1099	1168	1239	1313	1389	1467	1548	1631	1717	1805	1896	1989	2090	2183	2296	2413	2515	2636	2774
24	233	265	300	337	379	421	463	510	559	611	666	725	789	846	911	979	1051	1125	1199	1274	1352	1432	1515	1601	1689	1780	1873	1969	2068	2171	2280	2391	2505	2621	2742	2864	2990
26	252	287	325	366	411	456	502	552	606	662	721	785	848	916	987	1061	1139	1219	1298	1380	1464	1551	1641	1734	1830	1928	2029	2133	2240	2351	2470	2590	2715	2840	2971	3106	3245
28	272	309	350	394	442	491	540	595	652	716	777	844	914	987	1063	1142	1226	1312	1398	1486	1577	1671	1768	1868	1970	2076	2185	2297	2412	2532	2656	2783	2916	3055	3199	3348	3502
30	291	331	375	422	474	526	579	637	699	764	832	904	979	1058	1139	1224	1314	1406	1498	1592	1690	1790	1894	2001	2111	2224	2342	2463	2588	2718	2850	2988	3130	3276	3428	3585	3748
32	311	354	400	450	506	561	618	680	745	815	888	964	1044	1128	1215	1306	1402	1500	1598	1698	1802	1909	2020	2134	2252	2373	2498	2626	2757	2893	3032	3175	3324	3477	3634	3797	3964
34	330	376	425	478	536	596	656	722	792	866	943	1024	1109	1198	1291	1387	1489	1594	1698	1805	1915	2029	2146	2268	2392	2521	2654	2790	2929	3074	3224	3378	3537	3701	3870	4044	4223
36	350	398	450	506	569	631	695	765	838	916	999	1085	1175	1269	1367	1468	1577	1687	1798	1911	2028	2148	2273	2401	2533	2669	2810	2954	3102	3256	3414	3577	3745	3918	4096	4279	4467
38	369	420	475	534	600	667	733	807	885	967	1054	1145	1240	1339	1442	1550	1664	1781	1898	2017	2140	2267	2399	2535	2674	2818	2966	3118	3274	3436	3603	3775	3952	4134	4321	4513	4711
40	388	442	500	562	632	702	772	850	932	1018	1110	1205	1305	1410	1518	1632	1752	1875	1998	2123	2253	2387	2524	2667	2815	2966	3120	3282	3446	3617	3792	3973	4160	4352	4549	4752	4960
42	408	464	525	591	664	737	811	892	978	1069	1165	1265	1370	1480	1594	1714	1840	1969	2097	2239	2365	2506	2651	2801	2956	3114	3277	3446	3619	3798	3982	4172	4367	4568	4774	4986	5203
44	427	486	550	619	695	772	849	935	1025	1120	1221	1326	1436	1551	1670	1795	1927	2062	2197	2336	2478	2625	2776	2933	3096	3265	3439	3618	3803	3993	4188	4389	4595	4807	5025	5248	5477
46	447	508	575	647	727	807	888	977	1071	1171	1276	1386	1501	1622	1746	1877	2015	2156	2297	2442	2591	2745	2904	3068	3237	3411	3590	3774	3963	4159	4359	4566	4779	4998	5222	5452	5688
48	466	530	600	675	758	842	926	1020	1118	1222	1332	1446	1566	1692	1822	1958	2102	2250	2397	2548	2703	2864	3030	3202	3379	3562	3750	3944	4143	4348	4560	4777	5000	5229	5464	5705	5952
50	485	549	625	703	790	877	965	1062	1165	1273	1387	1506	1632	1762	1898	2040	2190	2344	2497	2654	2816	2983	3157	3335	3518	3708	3904	4105	4312	4524	4743	4968	5199	5436	5680	5930	6187
52	505	575	651	731	822	912	1004	1104	1211	1324	1442	1567	1697	1833	1974	2122	2278																				
54	524	597	676	759	853	947	1042	1147	1258	1375	1498	1627	1763	1909	2060	2215	2365																				
56	544	619	701	787	885	982	1081	1189	1304	1426	1553	1687	1827	1974	2126	2285	2449																				
58	563	641	726	815	916	1017	1119	1232	1351	1477	1609	1748	1893	2043	2202	2366	2540																				
60	583	663	751	844	948	1052	1158	1274	1397	1528	1664	1808	1958	2115	2278	2448	2628																				

State Log Scale.

Diameter in inches

81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	60	61	62	63	64	65	66	Length in Feet
673	701	730	759	789	821	859	1010	1017	1126	1186	1249	1313	1378	1446	1520	1594	1670	1747	1828	1909	1993	2079	2168	2258	2351	16
734	788	843	899	955	1014	1074	1136	1200	1266	1334	1405	1477	1551	1627	1710	1779	1878	1966	2056	2148	2242	2339	2438	2541	2645	18
816	876	937	999	1062	1126	1193	1263	1334	1407	1483	1561	1641	1723	1805	1890	1978	2067	2159	2253	2357	2462	2600	2710	2823	2939	3058	3179	3304	3431	3561	3695	3832	3972	4117	20
898	964	1031	1099	1168	1239	1313	1389	1467	1548	1631	1717	1805	1896	1989	2086	2182	2296	2409	2519	2626	2741	2860	2981	3106	3235	3364	3497	3634	3774	3917	4064	4215	4370	4529	22
979	1051	1125	1199	1274	1352	1432	1515	1601	1689	1780	1873	1969	2068	2170	2280	2391	2505	2621	2742	2864	2990	3120	3254	3388	3527	3669	3815	3964	4117	4273	4433	4598	4767	4940	24
1061	1139	1219	1298	1380	1464	1554	1641	1734	1830	1928	2029	2133	2241	2351	2476	2590	2715	2846	2971	3103	3239	3379	3523	3670	3821	3975	4132	4294	4460	4630	4805	4984	5167	5354	26
1142	1226	1312	1398	1486	1577	1671	1768	1868	1970	2075	2183	2297	2418	2538	2665	2799	2928	3065	3199	3342	3489	3639	3794	3952	4115	4281	4451	4625	4803	4985	5172	5364	5561	5764	28
1228	1314	1406	1498	1592	1690	1790	1894	2001	2111	2226	2342	2463	2586	2715	2850	2989	3131	3276	3428	3580	3738	3899	4065	4234	4409	4587	4769	4955	5146	5341	5542	5747	5959	6175	30
1306	1402	1500	1598	1698	1802	1909	2020	2134	2252	2373	2498	2626	2757	2893	3032	3175	3322	3473	3626	3789	3957	4129	4306	4487	4673	4863	5058	5257	5461	5670	5884	6102	6326	6557	32
1387	1489	1594	1698	1805	1915	2029	2146	2268	2392	2521	2654	2790	2929	3074	3224	3377	3535	3698	3865	4035	4206	4381	4560	4744	4933	5127	5326	5530	5739	5953	6172	6396	6625	6860	34
1468	1577	1687	1798	1911	2028	2148	2273	2401	2533	2669	2810	2956	3102	3255	3412	3574	3741	3913	4089	4269	4454	4644	4839	5038	5243	5453	5668	5888	6113	6344	6580	6822	7070	7324	36
1540	1664	1791	1918	2047	2180	2317	2459	2606	2758	2915	3077	3244	3416	3594	3777	3966	4160	4360	4565	4777	4994	5217	5447	5683	5926	6176	6433	6697	6968	7246	7532	7826	8128	8439	38
1632	1752	1875	1998	2123	2253	2387	2525	2669	2818	2966	3128	3292	3466	3647	3835	4030	4232	4441	4656	4878	5107	5343	5587	5838	6097	6364	6639	6923	7216	7518	7830	8152	8484	8826	40
1714	1840	1969	2097	2229	2365	2506	2651	2801	2956	3114	3277	3446	3619	3799	3986	4180	4381	4589	4805	5029	5261	5502	5752	6011	6280	6559	6848	7147	7457	7778	8110	8453	8808	9175	42
1795	1927	2062	2197	2336	2478	2625	2775	2931	3090	3254	3422	3610	3791	3978	4180																				44
1877	2015	2156	2297	2442	2591	2745	2904	3068	3237	3411	3590	3774	3963	4159	4370																				46
1958	2102	2250	2397	2548	2703	2862	3026	3196	3373	3559	3746	3938	4136	4340	4560																				48
2040	2190	2344	2497	2654	2816	2983	3157	3333	3518	3708	3902	4103	4308	4521	4750																				50
2122	2278																																		52
2205	2366																																		54
2288	2454																																		56
2366	2540																																		58
2448	2628																																		60

Spaulding Log Scale — Published by Griffin & Reed, Astoria, Oregon

Diameter in inches

Length in feet	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51
16	161	181	216	245	276	308	341	376	412	449	488	528	569	612	656	701	748	796	845	897	950	1006	1064	1124	1185	1248	1312	1377	1444	1512	1581	1652	1724	1797	1872	1946
18	181	211	243	276	310	346	384	423	463	505	548	594	640	688	738	789	841	895	951	1009	1069	1132	1197	1264	1333	1404	1476	1549	1629	1701	1779	1858	1939	2022	2106	2191
20	201	235	270	306	345	385	426	470	515	561	610	660	711	765	820	876	935	995	1056	1121	1188	1258	1330	1405	1481	1560	1640	1721	1810	1890	1976	2065	2154	2244	2340	2434
22	221	258	297	337	379	423	469	517	566	617	671	726	782	841	902	964	1028	1094	1162	1233	1307	1384	1463	1545	1629	1716	1804	1893	1991	2079	2174	2271	2370	2470	2574	2678
24	242	282	324	367	414	462	512	564	618	674	732	792	854	918	984	1052	1122	1194	1268	1346	1426	1510	1596	1686	1778	1874	1968	2066	2172	2268	2370	2478	2586	2694	2808	2922
26	262	304	350	398	448	500	554	610	668	730	792	858	924	994	1066	1138	1214	1292	1372	1458	1544	1634	1728	1826	1926	2028	2138	2238	2352	2454	2564	2684	2800	2920	3044	3166
28	282	328	378	428	482	538	596	658	720	786	854	924	996	1070	1148	1226	1308	1392	1478	1570	1662	1760	1862	1966	2074	2184	2298	2410	2534	2646	2766	2892	3016	3144	3276	3408
30	302	352	404	460	516	576	640	704	774	842	914	990	1066	1146	1230	1314	1402	1492	1584	1682	1782	1886	1994	2104	2220	2340	2460	2582	2714	2838	2966	3096	3232	3370	3510	3654
32	322	376	432	490	552	616	682	752	824	898	976	1056	1138	1224	1312	1402	1496	1592	1690	1794	1900	2012	2128	2244	2364	2488	2620	2754	2892	3028	3168	3304	3448	3594	3744	3898
34	342	398	458	520	586	654	724	798	874	954	1036	1122	1208	1300	1394	1490	1588	1690	1796	1906	2018	2138	2260	2388	2518	2658	2788	2926	3074	3218	3360	3510	3668	3818	3978	4142
36	362	422	486	552	620	692	768	846	926	1010	1098	1188	1280	1376	1476	1578	1680	1790	1902	2018	2138	2264	2394	2528	2666	2808	2954	3102	3254	3408	3568	3716	3878	4042	4212	4388
38	382	446	512	582	654	730	810	892	978	1066	1158	1254	1352	1452	1558	1664	1776	1890	2006	2130	2256	2390	2528	2668	2814	2964	3116	3270	3438	3598	3768	3926	4096	4266	4446	4628
40	402	470	540	612	690	770	852	940	1030	1122	1220	1320	1426	1536	1646	1762	1870	1990	2112	2242	2376	2516	2660	2810	2962	3120	3280	3442	3620	3780	3952	4130	4310	4492	4680	4870
42	422	492	566	644	724	808	896	986	1080	1178	1281	1386	1494	1606	1728	1840	1963	2087	2215	2348	2485	2628	2778	2930	3110	3270	3444	3614								
44	442	516	596	674	768	846	938	1034	1134	1234	1342	1452	1566	1686	1804	1928	2056	2188	2324	2466	2614	2768	2926	3090	3258	3428	3608	3786								
46	462	540	620	704	792	884	980	1080	1184	1290	1402	1518	1636	1760	1886	2016	2152	2288	2430	2579	2738	2894	3059	3230	3407	3588	3778	3959								
48	484	564	648	734	828	924	1024	1128	1236	1348	1464	1584	1708	1836	1968	2108	2244	2388	2536	2692	2852	3020	3194	3372	3558	3744	3936	4132								
50	502	587	674	766	861	961	1066	1174	1289	1404	1526	1652	1778	1911	2048	2190	2337	2476	2640	2808	2978	3148	3324	3511	3704	3901	4100	4304								
52	524	608	720	796	896	1000	1108	1220	1338	1460	1586	1716	1848	1988	2132	2278	2430	2586	2744	2916	3088	3267	3452	3645	3848	4056	4264	4476								
54	544	632	728	826	930	1038	1151	1266	1390	1516	1648	1782	1920	2064	2214	2368	2526	2686	2850	3028	3206	3390	3582	3782	3988	4204	4416	4648								
56	564	656	764	858	964	1076	1192	1316	1440	1572	1706	1848	1992	2140	2296	2456	2618	2786	2956	3140	3324	3516	3716	3924	4136	4360	4584									
58	584	680	782	888	998	1114	1236	1362	1492	1628	1768	1914	2064	2216	2378	2544	2712	2886	3064	3252	3442	3642	3850	4064	4284	4516	4752									
60	604	704	808	920	1032	1152	1280	1408	1548	1684	1830	1980	2132	2292	2460	2632	2806	2986	3172	3364	3560	3768	3984	4204	4432	4672										

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Diameter in inches

31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	Length in feet
701	748	796	845	897	950	1006	1064	1124	1185	1248	1312	1377	1444	1512	1581	1652	1724	1797	1872	1948	2026	2104	2184	2266	2350	2436	2524	2613	2704	16
789	841	895	951	1009	1069	1132	1197	1264	1333	1404	1476	1549	1629	1701	1777	1858	1939	2022	2106	2191	2278	2367	2457	2550	2644	2740	2839	2940	3042	18
876	935	995	1056	1121	1188	1258	1330	1405	1481	1560	1640	1721	1810	1890	1974	2065	2155	2246	2340	2435	2531	2630	2730	2833	2938	3045	3156	3266	3380	20
964	1028	1094	1162	1233	1307	1384	1463	1545	1629	1711	1844	1892	1991	2079	2174	2271	2370	2470	2574	2678	2784	2893	3003	3116	3232	3349	3470	3592	3718	22
1052	1122	1194	1268	1346	1426	1510	1596	1686	1778	1873	1968	2066	2172	2278	2373	2478	2586	2694	2805	2922	3028	3156	3276	3400	3526	3654	3786	3918	4054	24
1138	1214	1292	1372	1458	1544	1634	1728	1826	1926	2028	2132	2238	2358	2456	2568	2684	2800	2920	3044	3164	3290	3418	3548	3682	3818	3958	4100	4246	4396	26
1226	1308	1392	1478	1570	1662	1760	1862	1966	2074	2184	2297	2410	2528	2646	2766	2890	3016	3144	3276	3408	3544	3682	3822	3966	4112	4262	4416	4572	4732	28
1314	1402	1492	1584	1682	1782	1886	1996	2106	2220	2340	2466	2598	2714	2838	2966	3098	3232	3370	3510	3652	3798	3948	4094	4248	4406	4568	4732	4900	5070	30
1402	1496	1602	1690	1794	1900	2018	2128	2246	2370	2496	2634	2774	2907	3034	3172	3304	3446	3594	3744	3894	4046	4202	4362	4528	4698	4872	5050	5232	5418	32
1490	1588	1690	1796	1906	2020	2138	2260	2388	2518	2652	2788	2928	3072	3218	3368	3520	3676	3836	3998	4164	4334	4508	4686	4868	5054	5244	5438	5636	5838	34
1578	1680	1790	1908	2018	2138	2264	2394	2528	2666	2808	2956	3108	3258	3408	3562	3716	3874	4036	4202	4372	4548	4728	4912	5102	5296	5496	5700	5910	6124	36
1664	1776	1890	2016	2130	2256	2390	2528	2668	2816	2964	3116	3270	3430	3592	3758	3928	4104	4286	4474	4668	4868	5074	5286	5504	5728	5958	6194	6436	6684	38
1752	1870	1990	2112	2244	2376	2514	2660	2810	2964	3120	3280	3444	3614	3790	3970	4156	4346	4542	4744	4952	5166	5386	5612	5844	6082	6328	6580	6838	7104	40
1840	1963	2089	2218	2354	2495	2642	2793	2950	3110	3276	3444	3614	3790	3970	4156	4346	4542	4744	4952	5166	5386	5612	5844	6082	6328	6580	6838	7104	7376	42
1923	2056	2188	2324	2466	2614	2766	2924	3090	3258	3430	3608	3786	3970	4160	4354	4554	4760	4972	5190	5414	5644	5880	6122	6370	6626	6888	7156	7432	7714	44
2016	2160	2288	2430	2579	2738	2904	3078	3230	3407	3588	3778	3970	4168	4368	4576	4790	5010	5238	5472	5714	5964	6220	6484	6756	7036	7324	7620	7924	8236	46
2106	2264	2398	2536	2692	2862	3038	3220	3372	3558	3744	3936	4136	4344	4556	4774	4998	5228	5466	5712	5966	6228	6498	6776	7062	7356	7658	7968	8288	8616	48
2190	2352	2496	2640	2804	2970	3148	3334	3514	3702	3900	4100	4304	4520	4744	4970	5204	5444	5694	5950	6214	6488	6768	7058	7356	7662	7978	8304	8638	8980	50
2270	2430	2586	2746	2916	3088	3272	3458	3648	3852	4052	4264	4476	4698	4928	5166	5408	5660	5922	6188	6464	6748	7038	7340	7650	7968	8296	8632	8978	9334	52
2354	2522	2686	2850	3028	3206	3396	3592	3792	4004	4218	4432	4648	4878	5118	5366	5618	5878	6150	6428	6714	7008	7312	7624	7946	8278	8618	8968	9328	9698	54
																														56
																														58
																														60

592 Know all men by these presents: That P. J. McGowan, widower, of Pacific County, Washington, for and in consideration of the sum of five thousand dollars, lawful money of the United States of America to him in hand paid by the Nicomen Boom Co., a corporation, the receipt of which is hereby acknowledged, has granted, bargained and sold, and does by these presents grant, bargain and sell unto the said Nicomen Boom Co. all his interest in and to the following described real estate situate in the county of Pacific, State of Washington, t--wit:—All of the tide land of the second class, situate in front of, abutting upon and adjacent to, lots five, six and seven, in section twenty-three; lots five, six, and seven, in section twenty-two; lots five and six in section twenty-seven; lots one, two, three and five, and the Amos Smith Donation Land Claim number 37, in section twenty-six; all in township fifteen, north, range ten, west of W. M., excepting and reserving therefrom all tide lands in said lot five in said section twenty-six upon which are located any improvements in connection with the cannery of said P. J. McGowan, or which may be necessary for the convenient use and occupation of said cannery.

Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and all said grantor's right, title, interest, claim, possession, demand of every kind whatever, whether at law or equity, of, in, or to the above described premises and every part and parcel thereof.

P. J. McGOWAN. [SEAL.]

Signed, sealed and delivered in presence of
W. B. STRATTON.
H. W. B. HEWEN.

(Documentary Stamp.)

STATE OF WASHINGTON, *County of Pacific, ss:*

593 I, H. W. B. Hewen, a notary public in and for the state of Washington, duly commissioned and sworn, residing at South Bend, in said state, do hereby certify that on this 7th day of June, 1900, personally appeared before me the within named P. J. McGowan, widower, personally known to me to be the identical individual described in and who executed the within and foregoing instrument and he acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned and set forth.

In testimony whereof, I have hereunto set my hand and notarial seal the day and year in this certificate first above written.

H. W. B. HEWEN,
[SEAL.] *Notary Public for Washington,*
Residing at South Bend, Wash.

Indorsed: Plaintiff's Ex. D. Filed Dec. 1, 1903. E. A. Seaborg, County Clerk.

594 No. 2444.

Principal	$237.27
Interest	42.72
Total	$279.99

Office of Commissioner of Public Lands.

Received of P. J. McGowan the sum of two hundred seventy nine & 99/100 dollars to apply on Tide Contract No. 329.

S. A. CALVERT, *Commissioner*,
Per H.

Olympia, Wash, Mar. 2, 1903.
Series 1902.

Principal	$237.27
Interest	56.96
Total	$294.23

Office of Commissioner of Public Lands.

OLYMPIA, WASH., *Mar.* 4, 1902.

Received of P. J. McGowan payment on Tide land Contract No. 329, or Lease No. — the sum of two hundred ninety-four & 23/100 Dollars.

S. A. CALVERT, *Commissioner*,
Per H.

Title Land—General Fund.
No. 3278.

Principal	$237.27
Interest	85.44
Total	$322.71

Office of Commissioner of Public Lands.

OLYMPIA, WASH., *Mar.* 7, 1900.

Received of P. J. McGowan Sons Inc. Payment on Tide Land Contract No. 329, in Washington, the sum of Three hundred twenty-two & 71/100 Dollars.

ROBERT BRIDGES, *Commissioner*,
By —— ——.

Tide Land—General Fund.
No. 1228.

595 Original.

This Agreement, Made in duplicate this 25th day of May 1896, by and between the State of Washington, party of the first part, and P. J. McGowan, of Chenook, Pacific County, Washington, of the second part, pursuant to an act of the Legislature of said state entitled "An act to provide for the selection, survey, management, lease and disposition of the state's granted, tide, oyster and other lands, harbor areas, and for the confirmation and completion of the several grants to the state by the United States, creating a Board of State Land Commissioners, defining their duties and authorizing them to act as the commission provided for in article 15 of the State Constitution, and declaring an emergency," approved March 26, 1895.

Witnesseth, That the party of the first part, in consideration of the sum of twenty-three hundred seventy-two and 75-100 (2372.75) Dollars, to be paid as hereinafter agreed, and of the faithful performance of the covenants, agreements and conditions hereinafter expressed, on the part of the party of the second part to be performed and kept, hereby agrees to sell to the party of the second part the certain tracts or parcels of tide land of the third class situated in Pacific County and State of Washington, described as follow-, to wit: All of the tide land of the third class, owned by the State of Washington, situated in fron- of, abutting upon and adjacent to, lots 5, 6 and 7, section 22; lots 5, 6 and 7, section 23; lots 2, 3, 5, 7, 8, 9, 10 and the Donation Land Claim #37 of Amos Smith in section 26 and lots 3, 4, 5 and 6, in section 27, all in township 15 north, range 10 west, W. M.; the meander line of the above described upland bordering on said tide land being more particularly described according to the United States government field notes as follows:—Lots 5, 6, and 7, Sec. 22:—Commencing at the meander corner of fractional sections 22 and 27; thence along the meander line N. 18° W., 7.20 chains; N. 6° W., 6.50 chains; N. 17° E., 8.00 chains; N. 33° E., 10.00 chains; N. 36½° E., 18.25 chains; N. 41° E., 16.40 chains; N. 68° E., 4.50 chains to corner to fractional sections 22 and 23 said twp. and range.

596 Lots 5, 6 and 7, Sec. 23:—Beginning at meander corner to fractional sections 22 and 23; thence along the meander line N. 75° E., 9.80 chs; East, 9.50 chains; S. 79° E., 10.00 chains; N. 86° E., 5.00 chains; N. 67° E., 5.00 chains; N. 44° E., 7.50 chains; N. 56° E., 24.50 chains to meander corner to fractional sections 14 and 23 and northeast corner of lot 5.

Lot 3, Sec. 26:—Beginning at a point on the meander line of said section 26, where the line dividing lots 1 and 3 would intersect the same; thence in lot 3: S. 5° E., 3.00 chains; S. 28° E., 6.00 chains; S. 40° E., 7.50 chains; S. 58° E., 19.50 chains; S. 45° W., 2.25 chains N. 80° W., 10.00 chains; N. 55° W., 19.75 chains to meander corner to fractional sections 26 and 27.

Lots 5 and 6, Sec. 27:—Beginning at the meander corner to fractional sections 26 and 27; thence along the meander line N. 48° W., 24.00 chains; N. 43° W., 10.00 chains; N. 30° W., 12.50 chains to meander corner to fractional sections 22 and 27.

Lot 3, Sec. 27:—Beginning at the meander corner to fractional sections 26 and 27; thence N. 50° W., 24.00 chains; N. 40° W., 2.10 chains where the line between lots 2 and 3 would intersect the same.

Lot 4, Sec. 27:—Beginning at the meander corner to fractional sections 26 and 27; thence in lot 4; S. 75° W., 17.50 chains to the meander corner to fractional sections 27 and 34.

Lots 7, 8, 9 and 10, Sec. 26:—Beginning at the meander corner to fractional sections 26 and 27; thence S. 51½° E., 8.00 chains; S. 63° E., 7.50 chains; S. 70½° E., 23.50 chains; S. 52° E., 3.50 chains; S. 14½° E., 9.00 chains; South 4.50 chains; West 26.50 chains; S. 76° W., 14.00 chains to meander corner to fractional sections 26 and 27.

Lots 2 and 5 and the Amos Smith Donation Land Claim #37 in Sec. 26:—Beginning at a point on the meander line of said section 26 where the line dividing lots 5 and 6 would intersect the same; thence N. 13° W., 7.50 chains; N. 41½° W., 15.30 chains; N. 58° W., 24.00 chains; N. 32° W., 10.00 chains; N. 2½° W.,
597 21.00 chains to the meander corner of fractional sections 23 and 26; having a total frontage of 474.55 lineal chains measured on the meander line of all of the above described upland, as shown by said field notes.

Reserving and excepting from the above described land such portions as are suitable for the cultivation of oysters.

And the party of the second part hereby covenants and agrees to purchase of the party of the first part the above described land, and to pay therefor the full sum of twenty-three hundred seventy-two and 75-100 (2372.75) Dollars in manner following, that is to say:

The sum of $237.32 at or before the execution of this contract the receipt whereof is hereby acknowledged.

The sum of $237.27 principal, and $98.21 interest, on the first day of March, 1897.

The sum of $237.27 principal and $113.92 interest, on the first day of March, 1898.

The sum of $237.27 principal and $99.68 interest, on the first day of March, 1899.

The sum of $237.27 principal and $85.44 interest, on the first day of March, 1900.

The sum of $237.27 principal and $71.20 interest, on the first day of March, 1901.

The sum of $237.27 principal and $56.96 interest, on the first day of March, 1902.

The sum of $237.27 principal, and $42.72 interest, on the first day of March, 1903.

The sum of $237.27 principal and $28.48 interest, on the first day of March, 1904.

The sum of $237.27 principal and $14.24 interest, on the first day of March, 1905.

And the said second party covenants and agrees to pay said principal sum and interest as above specified at the rate of six per cent. per annum in gold coin of the United States, at the office
598 of the State Treasurer at the capital of said state, and that he will pay all taxes and assessments of every kind that may be

levied or assessed on said land and premises, and that if said second party shall fail to pay any of the sums above specified, either of principal, interest, taxes or assessments, when the same shall become due and for six months thereafter, he will, on demand of the Board of State Land Commissioners or other authorized officer of the state, quietly and peaceably surrender the possession of the above described land and premises and every part thereof; and upon the failure to pay as above specified, all rights of said purchaser under this contract, may, at the election of said Board of Land Commissioners acting for the State of Washington and without notice to said purchaser, be declared forfeited, and when so declared forfeited and thereupon the state shall be released from all obligation to convey said land; and all payments theretofore made on this contract, and any and all improvements made on said land, or any part thereof, shall thereupon be forfeited to and belong to said state of Washington.

But if said party of the second part shall well and faithfully keep and perform all the covenants and agreements hereinbefore specified by him to be kept and performed in the manner and at or before the times above specified, he shall be entitled to a patent to said land from said state of Washington as provided by law upon surrender of this contract and cancellation of same.

The terms of this contract shall be binding in favor of and against the said party of the second part, his heirs, executors, administrators, and assigns, but no assignment of this contract shall in any way relieve the said party of the second part from the performance of the conditions hereof on his part, nor be recognized nor admitted by said state of Washington, unless the same shall be endorsed hereon and executed, witnessed and acknowledged in the same manner as a conveyance of real estate is required by law to be, and said assignment shall be accepted by and entered on the records of the Commissioner of Public Lands; nor shall any such assignment of the party
599 of the second part for less than the entire interest of said party to the whole of the lands above described be recognized or admitted.

In testimony whereof The party of the first part, by the Commissioner of Public Lands, and the party of the second part have hereunto subscribed their names in duplicate.

THE STATE OF WASHINGTON,
By W. T. FORREST,
Commissioner of Public Lands.
P. J. McGOWAN, *Purchaser,*
P. O. Address Astoria, Clatsop Co., State of Oregon.

Witness the signature of purchaser:
M. M. DE WERT.
E. P. NOONAN.

[Seal Commissioner of Public Lands.]

Indorsed: No. 329. Contract of Sale. State of Washington with P. J. McGowan. Class 3rd Tide. Filed Oct. 7th, 1903. E. A. Seaborg, County Clerk. Plaintiff Exhibit C. Plaintiff's Ex. C. Filed Dec. 1, 1903. E. A. Seaborg, County Clerk.

600 UNITED STATES OF AMERICA, *State of Washington:*

Office of the Secretary of State.

I, Sam H. Nichols, Secretary of State of the State of Washington, do hereby certify that the annexed copy of the boom plat of the Nicomen Boom Company is a true and correct tracing of the original plat of said company filed in this office on the 5th day of April, A. D. 1900, and now remaining on file herein, said copy being traced from and compared with said original; and I further certify that I have carefully compared the attached description with the original description on said plat and find the same to be a full, true and correct copy of said original and of the whole thereof, together with all official endorsements thereon.

In testimony whereof, I have hereunto set my hand and affixed hereto the seal of the State of Washington. Done at Olympia, this 9th day of September, A. D. 1903.

[SEAL.] SAM H. NICHOLS,
Secretary of State.

(Here follows map marked p. 600*a*.)

601 PL'F'S EX. B.

J. A. G. O.
(8016)

Whereas, By Section 10 of an Act of Congress approved March 3, 1899, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors and for other purposes," it is provided that it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any portion, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same;

And whereas, Mr. P. J. McGowan of South Bend, Washington, has applied to the secretary of war for permission to construct and maintain a log boom in North river, Washington, as shown on the attached plans, which have been recommended by the chief of engineers;

Now, therefore, This is to certify that the secretary of war hereby gives unto P. J. McGowan permission to construct and maintain a log boom in North river, at said place, as shown on said plans, subject to the following condition:

That the work herein permitted to be done shall be subject to the supervision and approval of the engineer officer of the United States Army in charge of the locality.

Witness my hand this fourteenth day of April, 1900.

[SEAL.] ELIHU ROOT,
Secretary of War.

(Here follows map marked p. 601*a*.)

601½ The following are Def. exhibits, whereas all the foregoing are Plff's exhibits, and the exhibits are paged and are given numbers, each page of said exhibits being numbered starting with No. 1 on first page of exhibits.

602 An agreement made and entered into by Mary Smith, a widow, in her own right, and said Mary Smith as guardian of the person and property of Eunice Smith, a minor; and Don L. Smith, parties of the first part; and John F. Hobi, party of the second part, all of said parties of Pacific County, State of Washington, Witnesseth, That whereas the said parties of the first part are the owners of certain lands, hereinafter described, bordering upon the North river and a certain Slough known as Smith's slough, which slough and river are valuable for the driving holding, booming and rafting logs at the place where said slough and river border thereon. Said lands being described as lots 1, 2 & 3 of section 22, and lot- 1 & 2 of section 23, of township 15 north, of range 10 west, of the Willamette Meridian, in Pacific County, State of Washington. And whereas the said party of the second part desires to drive, sack, hold, boom and raft saw logs and other timber products in said slough and river; and whereas in order to prepare said waters for said purposes is very costly and the improvements are of a permanent nature, and it being impracticable to limit the time of the duration of the easements and privileges sought by said party of the second part and granted by the said parties of the first part more definitely than is herein stated, therefore, in consideration of the provisions herein contained and the payment of the sum of $200.00 by the said party of the second part to the said parties of the first part each and every year during the life of this instrument to be paid at the times hereinafter stated, the said parties of the first part agree, grant and consent to the use of the waters of said streams adjacent and abutting upon said lands, and all necessary use of the shore lands of said hereinbefore described premises, to float, drive, sack, boom, hold and raft saw logs and other timber products as said party may desire to float, drive, sack, boom, hold and raft, and to drive all necessary piles, erect and maintain booms and other appliances necessary to carry on said business, and to erect, maintain and occupy the buildings
603 necessary and convenient for the use of the said party of the second part and his employees upon the lands hereinbefore described convenient to said waters, to the said party of the second part his heirs and assigns.

Provided further, that if said party of the second part shall in his said operations block up or seriously interfere with the free use, ingress or egress of said parties of the first part of the said premises, the said party at his own proper expense shall construct and plank a suitable and convenient road or way over the tide lands from the North river to the hill upon said premises.

The said party of the second part shall pay the said parties of the first part for the use of said premises as follows Twenty dollars upon

the signing of this contract and the remaining one hundred and eighty dollars at the end of the first year, and two hundred dollars on or before the first day of April, of each subsequent year that said party of the second part his heirs or assigns may occupy said premises. Time is expressly made the essence of this contract and if default be made in the said payments or in any of them, or in any part of them when by the terms of this contract the same shall be due and payable, then said parties of the first part may at their option declare the contract terminated; or either of said parties of the first part may declare the same terminated so far as his individual interests are concerned; It is further stipulated that said Eunice Smith, when she shall have arrived at her majority may at her option declare this contract terminated so far as it affects her interests in said property. It is further provided that upon the termination of this contract either because of default in payment or for any other cause, all buildings, boom, piling and other improvements upon said waters and premises shall become the property of said parties of the first part, and shall be turned over to them by said party of the first part uninjured save and except natural wear and tear and damages by the elements excepted. And the said party of the second part promises and agrees to well and truly perform all the conditions on his part to be performed set forth or implied in this agreement; that he will commit no waste upon said premises and that he will turn
604 over said improvements, booms, piling and other property connected therewith in good condition natural wear and tear and damage by the elements excepted, at the termination of this contract. It is further stipulated and agreed that said party of the second part may terminate this contract at any time by giving notice to said parties of the first part.

It is further stipulated and agreed that the terms and conditions of this agreement shall apply and be continued to the heirs and assigns of all the parties to this instrument as well as to the principals.

It is further stipulated and agreed that should said party of the second part use the minor or small sloughs or permits his logs or timber products to enter them or any of them that the shores or banks shall be shore boomed and piled so as to protect the banks and the bridges raised or built so as to permit the logs to pass under them without injury from the logs at the expense of the said party of the second part.

It is further stipulated and agreed that said party of the second part shall apportion and pay the $200.00 to the parties of the first part as follows, $125.00 to be paid to said Mary Smith as compensation for the use of her own premises and those of the said Eunice Smith, and $75.00 to said Don L. Smith and the same shall be paid at the dwelling upon the premises of said parties of the first part.

It is further stipulated and agreed that should the said Eunice Smith upon her arrival at her majority decide to terminate this contract, she shall not succeed to any interest in the booms, piling or other property in front of her premises but the same shall continue

and remain the property of said party of the second part his heirs or assigns, any thing herein contained to the contrary notwithstanding.

Executed in duplicate this 11th day of April, 1903.

MARY SMITH.
DON L. SMITH.
EUSIN SMITH,
By Mary Smith, Her Guardian.
JOHN F. HOBI.

605 STATE OF WASHINGTON, *Pacific County, ss:*

I, Sol Smith a notary public for the state of Washington, do hereby certify that on this 11th day of April, 1903, personally appeared before me Mary Smith and Don. L. Smith, to me personally known to be two of the individuals described in and who executed the within instrument, and acknowledged that they executed the same as their free and voluntary act and deed for the uses and purposes therein mentioned; and the said Mary Smith, guardian of the person and property of the said Eunice Smith, acknowledged that she signed the same as the free and voluntary act of the said Eunice Smith. Given under my hand and official seal this 11th day of April, 1903.

SOL SMITH,
[SEAL.] *Notary Public, Residing at South Bend, Pacific County, State of Washington.*

For a valuable consideration I hereby assign, transfer and set over to the North Shore Boom & Driving Company, a corporation, all my right title and interest in the within contract and agreement, and land described therein.

JOHN F. HOBI.

STATE OF WASHINGTON, *County of Pacific:*

This certifies that on the 12th day of Sept. 1903, personally appeared before me John F. Hobi, well known to me to be the person who executed the foregoing instrument and who acknowledged to me that he executed the said assignment voluntarily for the uses and purposes therein contained.

Witness my hand and official seal this 12th day of Sept. 1903.

[SEAL.] H. W. B. HEWEN,
Notary Public, Residing at South Bend, Wash.

Indorsed: Def'ts' Ex. 12. Filed Sept. 23, 1903. E. A. Seaborg, County Clerk.

606 This agreement, made this 10th day of June, A. D. 1903, between S. A. Soule, of the county of Pacific, and State of Washington, the party of the first part, and James Johnson of the same place, the party of the second part, Witnesseth: That in consideration of the stipulations herein contained, and the pay-

ments to be made as hereinafter specified, the party of the first part hereby agrees to sell unto the part- of the second part the following described real property, situated in the county of Pacific, State of Washington, and more particularly known and described as lot No. one (1) Sec. 27, Tp. 15, N. R. 9 W. W. M., as recorded in the office of the auditor of said county of Pacific for the sum of two hundred fifty dollars on which the said party of the second part has paid the sum of one hundred & fifty (150) dollars.

And the said party of the second part, in consideration of the premises, hereby agree- to pay the said party of the first part at the office of the South Bend Banking Company the remaining principal with interest at the rate of eight per cent. per annum at the times and in the manner following: Fifty (50) dollars on 18 months after date, and the remainder of fifty 50 dollars on three years after this date.

And the party of the second part in consideration of the premises, hereby agree- that he will regularly and seasonably pay all taxes and assessments, which may hereafter be lawfully imposed on said premises.

All improvements placed there shall remain, and shall not be removed before final payment be made for said above described premises.

In case the said party of the second part his legal representatives or assigns, shall pay the several sums of money aforesaid, punctually and at the several times above specified, and shall strictly and literally perform all and singular the agreements and stipulations aforesaid, according to the true intent and tenor thereof, then the said party of the first part will make unto the party of the second part his heirs or assigns, upon request, stand upon the surrender of this agreement a deed conveying said premises in fee simple, with the ordinary covenants of warranty; excepting, however, from the operation and subject matter of said covenants, the before men-
607 tioned taxes and assessments, and all liens and incumbrances created or imposed by said part- or his assigns.

But in case the said party of the second part shall fail to make the payments aforesaid or any of them, punctually and upon the strict terms, and at the times above specified, without any failure or default, the time of payment being declared to be the essence of this agreement; then the party of the first part shall have the right to declare this agreement null and void; and in such case all the rights and interests hereby created or then existing in favor of the said party of the second part, or derived under this agreement shall utterly cease and determine, and the aforesaid premises shall revert to and revest in said party of the first part without any declaration of forfeiture or act of re-entry, or without any other act by said party of the first part to be performed and without any right of the said party of the second part of reclamation or compensation for money paid or improvements made, as absolutely fully and perfectly as if this agreement had never been made.

And it is further agreed, That no agreement or condition or relations between the party of the second part and his assigns, or any

other person acquiring title or interest from or through him shall preclude the party of the first part from the right to convey the premises to said party of the second part or his assigns on surrender of this agreement and the payment of the unpaid portion of the purchase money, which may be due to the party of the first part.

In witness whereof, the said party of the first and second part has signed this agreement the day and year first above written.

S. A. SOULE.
JAMES JOHNSON.

M. D. EGBERT.
C. M. EGBERT.

608 STATE OF WASHINGTON, *County of Pacific, ss:*

For a valuable consideration, I hereby assign, transfer and set over to the North Shore Boom and Driving Company, a corporation, all my right, title and interest in the within contract for its use and benefit forever.

Dated Sep. 19, 1903.

JAMES JOHNSON.

STATE OF WASHINGTON, *County of Pacific:*

This certifies that on this 19th day of September, 1903, personally appeared before me James Johnson, unmarried, known to me to be the person whose name is subscribed to the foregoing assignment and who acknowledged to me that he executed the same voluntarily for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and seal the 19th day of September, 1903.

[SEAL.] H. W. B. HEWEN,
Notary Public, Residing at South Bend, Washington.

STATE OF WASHINGTON, *County of Pacific, ss:*

This Certifies, That on this 10 day of June, A. D. 1903, before me Marion D. Egbert, a Notary Public, in and for said State, personally appeared the within named S. A. Soule, who is known to me to be the identical person described in the within instrument, and who executed the foregoing assignment and acknowledged to me that he signed and sealed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and official seal the day and year last above written.

[SEAL.] MARION D. EGBERT,
Notary Public, Residing at So. Bend, Pacific Co., Wash.

Indorsed: Filed Dec. 4, 1903. E. A. Seaborg, County Clerk. Def'ts' Ex. 11.

609 *Contract.*

This agreement made and entered into by S. M. Reeves and Mamie Reeves, husband and wife, parties of the first part, and North Shore Boom and Driving Company, party of the second part:

Witnesseth: That whereas the said first parties are the owners of certain lands hereinafter described bordering upon North river in Pacific County, Washington, which river is valuable for driving, holding, booming and rafting logs at the place where said river borders on said land, which land is described as follows, lot four (4) in section twenty two (22), township fifteen (15) North, range ten (10) west of the W. M., and

Whereas, the said party of the second part desires to drive sack, hold, boom and raft saw logs and other timber products in said river and whereas in order to prepare said waters for said purpose the improvements are of a costly and permanent nature, and it being impracticable to limit the time of the duration of the easements and privileges sought by said party of the second part and granted by the said party of the first part more definitely than is herein stated, therefore in consideration of the provisions herein contained, and the payment of the sum of one hundred dollars ($100.00) by the said party of the second part to the said parties of the first part, each and every year during the life of this instrument from this date to be paid at the times hereinafter stated, the said parties of the first part agree grant, and consent to the use of the waters of said stream adjacent and abutting upon said lands, and all necessary use of the shore lands of said hereinbefore described premises, to float, drive, sack, boom, hold and raft saw logs and other timber products that said second party may desire to float, drive, hold, sack, boom or raft, and to drive all necessary piles, erect and maintain booms and other appliances necessary to carry on said business, to the said party of the second part his heirs and assigns.

The said party of the second part agrees to pay said first parties for the use of said premises and privileges as follows, ten dollars upon the signing of this contract, and the remaining ninety dollars
610 April 1, 1904, and one hundred dollars on or before the 1st day of April of each subsequent year, that the said party of the second part may occupy said premises. Time is expressly made the essence of this contract and if default be made in said payments or any of them when by the terms of this contract the same shall be due and payable then said parties of the first part may at their option declare the contract terminated.

It is further stipulated and agreed that said party of the second part may terminate this contract at any time by giving written notice, and that the terms and conditions of this agreement shall apply and be continued to the heirs and assigns of all the parties to this instrument as well as to the principals.

Witness our hands this 15th day of September, 1903.

S. M. REEVES,
MAMIE W. REEVES,
NORTH SHORE BOOM & DRIVING COMPANY,
By J. F. HOBI, *Secretary.*

STATE OF WASHINGTON, *County of Pacific, ss:*

I, H. W. B. Hewen, Notary Public of Washington, residing at South Bend, Pacific County, Washington, hereby certify that this fifteenth day of September, 1903, personally appeared before me, S. M. Reeves and Mamie Reeves, husband and wife known to me to be the individuals who executed the above contract and acknowledged to me that they signed the same as their free and voluntary act for the purposes therein set forth.

[SEAL.] H. W. B. HEWEN,
N. P. of Washington, Residing at South Bend, Wash.

611 STATE OF WASHINGTON, *County of Pacific, ss:*

I, A. P. Leonard, auditor and *ex officio* recorder of the county of Pacific, state of Washington and custodian of the records and files thereof hereby certify that the above and foregoing is a full, true and correct copy of an instrument, and of the whole thereof, as the same appears of record in Volume 6 Miscellaneous Record at page 568, in my office.

Witness my hand and official seal affixed this second day of December, 1903.

A. P. LEONARD,
County Auditor.
[SEAL.] By MADGE SOUTER, *Deputy.*

Indorsed: Copy. Filed for record at the request of J. W. Kleeb, Dec. 2nd, A. D. 1903, at 15 min. past 11 A. M. and recorded in vol. 6 of Misc. page 568 records of Pacific County, Wash. A. P. Leonard, County Auditor. By J. H. Dalton, Deputy. Def'ts' Ex. 10. Filed Dec. 4, 1903. E. A. Seaborg, County Clerk.

612 This Lease, made and entered into this 1st day of Dec. A. D. 1899, by and between the state of Washington, party of the first part, and W. H. Abel, of Montesano, Wash., party of the second part:

Witnesseth, That for and in consideration of the sum of forty-eight and 40-100 ($48.40) dollars per year to be paid to the Commissioner of Public Lands of the State of Washington, yearly in advance, and in consideration of the covenants hereinafter contained, the State of Washington doth lease, demise and let unto the party of the second part that tract or parcel of tide land of the second class, situate in Pacific county, State of Washington, and described as follows, to-wit:—

All tide lands of the second class, owned by the state of Washington, situate in front of, adjacent to or abutting upon that portion of the Gov. meander line lying in front of lots 1 & 6 Sec. 26, lots 1 & 2 Sec. 27, lots 1, 2, 3, 4 Sec. 22, lots 1, 2, 3 Sec. 23, lots 1 & 2 Sec. 14, lots 1 to 7 inc. Sec. 13 and lots 1, 2, 3, Sec. 24, all in Twp. 15 N., R. 10 W. W. M. and being a distance of 484.00 chains measured on said meander line for the period of thirty (30) years from the date of this instrument.

As a further consideration, the following covenants are mutually agreed to:

The payment of the above mentioned annual rent to the commissioner of Public Lands of the State of Washington yearly in advance is the essence of this contract, and the same shall be, and is, a condition precedent to the execution and continuance of this lease or any rights thereunder, and if said annual rent shall not be paid within sixty days from date due upon notice served by the commissioner of public lands, this lease shall be null and void.

The State of Washington reserves the right to approve any assignment of the whole or an undivided interest in and to the within leasehold.

The tide lands herein shall not be offered for sale except upon application of lessee, who shall have preference right to release or to purchase at highest rate bid: Provided, however, and these
613 rights are conditioned that lessee shall keep his lease in good standing.

All improvements placed upon said land by the lessee, capable of removal without damage to the land, where the lease is yielded to the state prior to any application to purchase said land, may be removed by the lessee or at his option may remain on the land subject to purchase or hire, and this lease is granted according to the provisions of an act relating to lease *and* etc. of state lands, approved March 16th, 1897, (as amended by section 50 approved March 13, 1899.)

All piling or other improvements placed upon the above described tide lands shall attach to and become a part of the realty unless moved or sold under the provision of the said act relating to leases, etc., of state lands, approved March 16th, 1897, within three years after termination by surrender or limitation of lease or release.

No statutory right vested in lessee is waived hereby, and lessee expressly agrees to all covenants herein, and binds himself or themselves for the payment of rent as hereinbefore set up.

This day and year above written.

[Seal of the Commissioner of Public Lands, State of Washington.]

THE STATE OF WASHINGTON,
By ROBERT BRIDGES,
Commissioner of Public Lands.
W. H. ABEL, *Lessee,*
P. O. Address, Montesano,
County of Chehalis, State of W'n.

Witnesses as to Lessee.
C. N. WILSON.
MALL CARLILE.

365

Know all men by these presents: That we, W. H. Abel and Ella R. Abel, of Montesano, Washington, for a valuable consideration to us in hand paid by the North Shore Boom and Driving Company, a corporation duly organized and existing under and by virtue of the laws of the state of Washington, do hereby assign, transfer and set over to said company all of *their* right, title and interest
614 in and to that certain lease executed by the State of Washington to the said W. H. Abel, dated December 1st, 1899, to all of the tide lands of the second class owned by the State of Washington, situate in front of, adjacent to or abutting upon that portion of the government meander line lying in front of lots 1 & 6 Sec. 26, lots 1 & 2 Sec. 27, lots 1, 2, 3, 4, Sec. 22, lots 1, 2, 3, Sec. 23, lots 1 & 2 Sec. 14, lots 1 to 7 inc. Sec. 13, and lots 1, 2, 3, Sec. 24 all in Twp. 15 N. Range 10 West W. M. and being a distance of 484.00 chains measured on said meander line.

To have and to hold unto the said North Shore Boom & Driving Company, and its assigns, for the period of said lease.

The said assignee hereby binds and obligates itself to perform all of the conditions of said lease.

W. H. ABEL. [SEAL.]
ELLA R. ABEL. [SEAL.]

STATE OF WASHINGTON, *County of Chehalis, ss:*

This is to certify that on this 14th day of September, 1903, before me D. W. Fleet, a notary public in and for the State of Washington, duly commissioned and sworn, personally appeared W. H. Abel and Ella R. Abel, his wife, to me well known to be the individuals described in and who executed the foregoing instrument, and acknowledged to me that they signed and sealed the same freely and voluntarily and for the uses and purposes therein mentioned.

Witness my hand and official seal this 14th day of September, A. D. 1903.

[Seal D. W. Fleet, Notary Public, State of Washington.]

D. W. FLEET,
Notary Public in and for the State of Washington,
Residing at Montesano, Washington.

Expiration of commission June 8, 1907.

615 STATE OF WASHINGTON:

OFFICE OF COMMISSIONER OF PUBLIC LANDS.

Appr. Sept. 15th, 1903.

S. A. CALLVERT,
Commissioner of Public Lands.

Recorded Sept. 19th 1903, at 9.15 o'clock A. M. at the request of the North Shore Boom & Driving Company, in Vol. "6" of Misc. Records at page 544.

STATE OF WASHINGTON, *County of Pacific, ss:*

I, A. P. Leonard, auditor and *ex officio* recorder of the county and state aforesaid, do hereby certify that the above and foregoing is a full, true and correct copy of a lease from the state of Washington to W. H. Abel, and an assignment of said lease from W. H. Abel and Ella R. Abel to the North Shore Boom & Driving Company and of the whole thereof as the same appears of record in Vol. "6" of Misc. Records of Pacific County State of Washington, at page 544 thereof.

In witness whereof, I have hereunto set my hand and affixed my official seal this 19th day of September, 1903.

A. P. LEONARD,
[SEAL.] *Auditor and ex-Officio Recorder of Pacific County, State of Washington.*

Indorsed: Def'ts' Ex. 9. Filed Dec. 4, 1903. E. A. Seaborg, County Clerk. Filed Sept. 23, 1903. E. A. Seaborg, County Clerk.

616 UNITED STATES OF AMERICA, *State of Washington:*

No. 5176.

DEPARTMENT OF STATE, OLYMPIA.

Whereas, The North Shore Boom & Driving Co., a corporation, organized and existing under the laws of the State of Washington, and having its principal place of business at So. Bend, in said state, having complied with the requirements of Section 5 of an act of the legislature of the state of Washington, approved March 13, 1897, entitled "An act fixing the fees to be paid to the Secretary of State by corporations doing business in this state, and declaring an emergency," by paying to the Secretary of State, for License Fee $10, for penalty $—

Now therefore, a license is hereby granted to the above named company to carry on business in the state of Washington for the year ending June 30, 1904.

In testimony whereof, I have hereunto set my hand and affixed the seal of the State of Washington, this 26th day of Aug. 1903.

SAM H. NICHOLS,
[SEAL.] *Secretary of State.*

Indorsed: Defendant's Ex. 8. Filed Dec. 4, 1903. E. A. Seaborg, County Clerk.

617 No. 3565.

(Domestic.) Article No. 13469.

UNITED STATES OF AMERICA, *State of Washington:*

OFFICE OF THE SECRETARY OF STATE.

I, Sam H. Nichols, Secretary of State of the State of Washington, do hereby certify that Articles of Incorporation of the The North Shore Boom and Driving Company, a domestic corporation, organized under the laws of the State of Washington and having its principal place of business at South Bend in said state, were on the 26th day of August, A. D. 1903, filed for record and recorded in Book 39, page 273, Domestic Corporations.

In testimony whereof, I have hereunto set my hand and affixed hereto the seal of the State of Washington.

Done at Olympia, this 31st day of August, A. D. 1903.

[SEAL.] SAM H. NICHOLS,
Secretary of State.

Indorsed: Defendant's Ex. 7. Filed Dec. 4, 1903. E. A. Seaborg, County Clerk.

618 B. O.

UNITED STATES ENGINEER OFFICE,
SEATTLE, WASHINGTON, *March* 23, 1903.

Mr. John F. Hobi, South Bend, Wash.

DEAR SIR: Referring to your application of February 7, 1903, for permission to construct and maintain a boom for storage of logs in North river, Pacific County, Wash., the Secretary of War directs that you be informed "that the war department will interpose no objection to its construction and maintenance in the manner proposed, as long as it does not unreasonably interfere with navigation."

By direction and in the absence of Major Millis:

Very respectfully, JAMES H. MURPHY,
Chief Clerk.

Indorsed: Defendant's Ex. 6. Filed Dec. 4, 1903. E. A. Seaborg, County Clerk.

619 Nicomen Boom Co.

Incorporated March 21, 1900.

P. J. McGowan, President. E. P. Noonan, Secretary.

McGOWAN, WASH., *Feb.* 13, 1903.

Mr. J. F. Hobi, Canton, Pacific Co., Wash.

DEAR SIR: Your letter of the 5th inst. is received and contents noted. We received advice from Mr. Lynn that you had notified him to drive your logs down in to the Boom, and we wrote Mr. Lynn that we would undertake this work providing that we found it came within the limits of the operative rights of the Boom Company. Since that time we have been looking up the rights and powers of the corporation, but we cannot find that the company has any rights, under its incorporation or charter, that will permit it to engage in driving logs or timber. It would appear that the company's powers are strictly limited to the booming and rafting of logs and other timber.

With reference to the logs that you mention as being beached below the boom: The Company will pay for such logs as escape the sheer boom or break through the boom itself. We do not know how the logs you mention came to get there.

Yours truly, THE NICOMEN BOOM CO.,
Per P. J. McGOWAN, *M'g'r.*

Indorsed: Filed Sept. 23, 1903. E. A. Seaborg, County Clerk. Def'ts' Ex. 5. Filed Dec. 4, 1903. E. A. Seaborg, County Clerk.

620 *Articles of Incorporation of the North Shore Boom and Driving Company.*

These Articles of Incorporation, Witnesseth: that we John W. Kleeb and John F. Hobi, each a citizen of the United States and of the State of Washington, do associate ourselves as a body corporate, and do hereby incorporate for the transaction of business as is authorized by these articles.

I.

That the name of this corporation shall be The North Shore Boom and Driving Company.

II.

The capital stock of this corporation shall be twenty thousand dollars, divided into two hundred shares of the par value of one hundred dollars each.

III.

The corporation shall have the following powers:

First: To catch, boom, sort, raft, and hold logs, lumber, piling, shingle-bolts and any and all timber products of any and all kinds whatsoever:

Second: To acquire, use, hold and transfer any and all real and personal estate or property by lease, purchase or otherwise, as shall or may be necessary, convenient or advisable to carry on the business of this corporation:

Third: To construct, maintain and use all necessary sheer or receiving booms, dolphins, piers, piles, or other structure for catching booming, rafting, storing and sorting any and all logs, shingle bolts, piles or other timber products of any and every kind and nature which may be put into or come down North river in the state of Washington:

Fourth: Also to clear and improve said North river or any of its tributaries; to remove all jams, roots, snags, rocks; improve
621 and straighten the channels; to build wing dams and sheer booms, construct dams with gates or otherwise for the purpose of storing water with which to produce artificial freshets and in all ways to improve such streams and river for the purposes herein mentioned and contemplated, viz. driving, sorting, rafting, booming, catching, holding and delivering logs and other timber products:

Fifth: To buy, hire, rent or in any way acquire tugs, steam boats, and other vessels and floats, or any and all appliances necessary or convenient in conducting the business of the corporation, or any part thereof, and in towing and transporting any and all of the said logs or timber products or in clearing said streams of obstructions as aforesaid;

Sixth: To do and perform any and all business and things convenient necessary or advisable in the conduct of all or any part of the foregoing work and improvement, whether particularly enumerated in these articles or not and consistent with the by-laws and Articles of incorporation of this corporation.

IV.

The existence of this corporation shall be fifty years.

V.

The number of trustees of this corporation shall be two and John W. Kleeb, John F. Hobi shall be the trustees for, and conduct the business of the corporation for the first six months of its existence and until their successors shall be elected and qualified.

VI.

The officers of this corporation shall be prescribed by the by-laws and who shall be elected and hold their respective offices for terms specified in said by-laws.

POOR COPY

VII.

The principal place of business of this corporation shall be South Bend Pacific County, Washington.

In witness whereof we have hereunto subscribed our names, and executed these articles in triplicate this 24th day of
622 August, 1903.

JOHN W. KLEEB.
JOHN F. HOBI.

STATE OF WASHINGTON, *County of Pacific, ss:*

I, H. W. B. Hewen, a Notary Public of the State of Washington, residing at South Bend, Pacific county, Washington, do hereby certify that on this day personally appeared before me the within named John W. Kleeb, John F. Hobi who are each personally known to me to be the identical persons described in and who executed the above and foregoing Articles of Incorporation, and they and each of them acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein set forth.

In witness whereof I have hereunto set my hand and official seal this 24th day of August, 1903.

H. W. B. HEWEN,
Notary Public of Washington, Residing at South Bend, Washington.

[Seal H. W. B. Hewen, Notary Public, State of Wash.]

C. E. June 2, 1906.
Filed August 26-1903, at 8-10 A. M.

STATE OF WASHINGTON, *County of Pacific, ss:*

I, A. P. Leonard, auditor and ex-officio recorder of the county of Pacific, state of Washington, and custodian of the records and files thereof, hereby certify that the above and foregoing is a full, true, and correct copy of an instrument, and of the whole thereof, as the same appears in the files in my office.

Witness my hand and official seal affixed this 4th day of December, in the year 1903.

[SEAL.] A. P. LEONARD,
County Auditor.

Indorsed: Copy of Articles of Incorporation of the North Shore Boom and Driving Company. Def'ts Ex. 4. Filed Dec. 5, 1903. E. A. Seaborg, County Clerk.

(Here follow maps marked pp. 622*a*, 622*b*, 622*c*, 622*d*, & 622*e*.)

623 No. 5336.

NICOMEN BOOM COMPANY, a Corporation, Appellant,
v.
NORTH SHORE BOOM & DRIVING COMPANY, a Corporation, Respondent.

Filed Sept. 30th, 1906.

This is a contest between two boom companies, their booms being located near the mouth of North river in Pacific county, Washington. The action is in equity, and was commenced by the Nicomen Boom Company for the purpose of restraining the defendant, the North Shore Boom & Driving Company, from constructing a boom upon a portion of the waters of said river and within the limits of territory included in the plat filed by the plaintiff company, as required by law. Both companies are organized under the laws of this state which authorize the organization of corporations for the purpose of catching, booming, sorting, rafting, and holding logs, lumber, or other timber products. In April, 1900, being in due time after the organization of the plaintiff company, it caused to be filed in the office of the secretary of state of the state of Washington its plat and survey, showing so much of the shore lines and waters of North river and lands contiguous thereto as it proposed to appropriate under the laws of this state. Before beginning the construction of its boom, it submitted to the secretary of war of the United States a plan of its proposed improvements and a plat of the territory to be occupied thereby, and was by said war department granted permission to construct a boom within the limits of said river covered by said plat of location. The territory designated by said plat of location embraces the shores of North river, which river is tributary to Willapa harbor, a bay leading into the Pacific ocean, and the territory extends from near the mouth of the river on both sides for some distance up the stream. The plaintiff thereupon acquired by purchase such upland and shore land on the left side of said river, reckoning down stream, as was necessary for its use in the premises, and promptly proceeded to erect boom works along the left side of the river, but stopped short of the upper end of the territory
624 covered by its plat of location. The boom substantially constructed at a cost of about $16,000, and from the time of its erection until this controversy arose it was constantly operated as originally constructed. While the plaintiff has done some work above, yet its boom has never been completed beyond its rudder sheer as originally built. The plaintiff has, however, always expected to extend the boom within the limits of said plat of location as the demands of business might require, and some weeks before the commencement of this action it had ordered piling for the purpose of extending its boom as originally constructed about one thousand feet further up the river. Through some delay, for which plaintiff was not responsible, it did not have this piling upon the ground, and therefore did not commence the actual work of extending the boom

until some days after the defendant had commenced to construct its boom as hereinafter mentioned. It was estimated by the plaintiff that the output of logs on North river for the season next following would be largely in excess of the output for the previous year, and that in such case the enlargement of its boom would be necessary for the purpose of receiving and handling such increased output. About this time, in August, 1903, the defendant company was organized, and it also filed its plat and survey in the office of the secretary of state, showing so much of the water and shore lines of North river and land contiguous thereto as it proposed to appropriate for its boom and driving purposes. It also claims that before commencing to construct its boom, it secured from the war department of the United States permission to construct within its said location. The plat of location filed by the defendant in the office of the secretary of state covered substantially the part of the territory embraced in the plat of the plaintiff, lying above the upper end of the sheer boom constructed by plaintiff as aforesaid. The defendant then proceeded to acquire uplands and tide lands within its plat of location, on the right side of the river, considered necessary for its use in the operation of its proposed boom, such lands being on the bank op-
625 posite to the side of the river occupied by the plaintiff's boom as constructed. On September 4, 1903, the defendant began the driving of piles for the construction of its boom, and erected a line of dolphins within the limits of both said plats of location. Thereupon this action was brought. An emergency restraining order was issued, and afterwards, upon notice, a temporary injunction was granted pending final hearing of the action. It appears that the indemnity bond required by the court under the last named injunctional order was not given by plaintiff, and thereupon the defendant continued with its work of construction. At the time of the trial, the defendant had substantially completed the construction of its proposed boom. The boom of the defendant is so constructed that logs coming down the river intended to reach the plaintiff's boom will necessarily enter the main boom of the defendant. The booms as proposed by the plaintiff and defendant cannot both be constructed. If the boom of the plaintiff should be extended up the river, the passage between its line of dolphins and the dolphins of defendant on the other side of the stream would be so narrow as to block navigation. Moreover it would be impracticable to operate both booms under such circumstances. If the defendant is permitted to operate its boom as constructed, the boom of plaintiff will receive only such timber from up the river as may escape from the boom of defendant and such as may be transmitted through that boom to plaintiff. The foregoing facts are practically undisputed in the case, as we are advised by the record and the findings of the court and by such exceptions as were taken to the findings. Exceptions were taken to certain findings embodying facts not stated above and to the refusal to make certain others, and on this appeal errors are assigned thereon. There is, however, no discussion in the brief in reference to these claims of error, and no particular evidence is pointed out in support thereof. We therefore believe we have sub-

stantially stated the controlling facts, and that they may be treated as undisputed. After an extended trial and the consideration
626 of much evidence, the court entered judgment denying the plaintiff's application for an injunction, and dismissing the action. This appeal is from that judgment.

For reasons hereinbefore stated, we shall not discuss such errors as have been assigned in relation to the court's findings of facts, but shall confine ourselves to the matters discussed in the briefs, all of which involve the correctness of the conclusions of law and the judgment thereon. Boom companies in this state are quasi public corporations, having the power of eminent domain, required by law to file a map of location and to perform becoming services for all persons requesting the same. See §§ 4378-4394, 1 Bal. Code. The provisions embodied within the above cited sections comprise the substance of two acts of the legislature passed respectively in the years 1890 and 1895. Section 4379 contains the following:

"Any corporation hereafter organized for the purpose mentioned in the last preceding section of this chapter shall, within ninety days after its articles of incorporation have been filed, proceed to file in the offices of the secretary of state a plat or survey of so much of the shore lines of the waters of the state and lands contiguous thereto as are proposed to be appropriated for said purpose by said corporation."

Appellant complied with the above and built a boom covering a portion of the territory sufficient to meet the then demands, so far as appears. It becomes necessary to determine the extent of its rights in the remaining territory. It is respondent's position that appellant has lost its rights in the located territory within which it has not actually constructed boom works. In suggesting to this court the principles which appellant claims should be applied in the premises, it argues that an analogy exists between the rights acquired under the filing of location plats by boom companies in this state and those arising from the filing of similar plats by railroad companies. We have been referred to authorities which consider the rights of railroad companies with reference to their location plats, and these authorities we have examined. Under legislative schemes for the location of railroad lines which are initiated by the filing of plats of location, it is held that compliance with the law in that particular secures to the locating company the right to construct and
627 operate a railroad upon such line, exclusive in that respect as to all other railroad corporations and free from the interference of any party. The right to locate its line of road in the place of its selection is delegated to the corporation by the sovereign power. The further right to subsequently acquire *in invitum* the right of way and necessary lands for operation of the road from the land owners is likewise delegated. The source of the franchise is in the sovereign power, which power confers the franchise upon the corporation as its delegated representative, and the grant is for public and not for private purposes. It is held that, inasmuch as public considerations enter into the grant of the franchise, public policy therefore favors it for the public convenience and use, and that a railroad

company by the filing of its plat of location and by reason of the notice thereof, impresses upon the lands a right in the nature of a lien in favor of its right to construct, which ripens into title through purchase or condemnation proceedings. It is further held that when a franchise has been thus conferred, no other railroad company may acquire title to the lands within such a location, or construct a road thereon to the exclusion of the right of the first locating company to acquire such title *in invitum*, and to construct its road upon the lands. Injunction has also been adopted as the proper remedy to prevent such interference. In support of the above propositions, which we have stated generally, we cite the following authorities:

Rochester H. & L. R. R. Co. *v.* New York etc. R. R. Co., 110 N. Y. 128;

Barre Railroad Co. *v.* Railroad Companies, 61 Vt. 1;

Sioux City & D. M. Ry. Co. *v.* C., M. & St. P. Ry. Co., 27 Fed. 770;

Morris & Essex R. R. Co. *v.* Blair, 9 N. J. Eq., 635;

Titusville & P. C. R. R. Co. *v.* Warren & V. R. Co., 12 Phila. 642;

Williamsport etc. R. Co. *v.* Philadelphia etc. R. Co., 141 Pa. St. 407.

Railway Co. *v.* Alling, 99 U. S. 463.

Respondent argues that the suggested analogy between railroad companies and boom companies as organized under the laws of this state is not well taken, and it therefore urges that search must be made for some other line of authorities in order to find an analogy
628 applicable to the questions in this case. It cites and discusses cases relating to the diversion and appropriation of water for mining, milling, irrigation, and manufacturing purposes. We are not impressed with the force of the analogy suggested by respondent. The appropriation of water for the purposes mentioned is ordinarily for private use and not to serve the public generally. The appropriator is permitted to take as much water as he can reasonably use to supply his own private property. It is held that he must proceed with reasonable diligence to determine how much he requires, and not deprive others of the use of water which he does not require. He is not compelled to serve the public in any respect, and the amount of water he may appropriate for his necessary purposes does not depend upon the public. The primary object in granting charters to railroad companies is that they shall serve the public, and the right of eminent domain to secure right of way and necessary grounds is given to them in order to aid such public purpose. The same is true of boom companies under the statutes of this state. Both are strictly public service corporations, and are required by law to serve the public in their respective spheres of operation. That the legislatures intended that an analogy shall exist between the two classes of corporations may be inferred from the boom statute itself. Section 4378, 1 Bal. Code, which confers the power of appropriation of lands upon boom companies, provides as follows:

"If such corporation shall not be able to agree with persons owning

land, shore rights, or other property sought to be appropriated, as to the amount of compensation to be paid therefor, the compensation therefor may be assessed and determined and the appropriation made in the manner provided by law for the appropriation of private property by railways."

It will thus be seen that the method provided for appropriating private property by railroad companies is specifically adopted as the method for boom companies. Respondent argues, however, that the rights acquired by boom company locations are not similar to those acquired by railroad companies, in that it claims that the rights of the latter are corporeal in their nature, while those of the former relate to water and therefore constitute a mere license or usufruct, incorporeal in its nature. The state, however, has dominion
629 over both the land and the water. The legislative scheme for boom companies requires that the land owner shall permit his land to be subjected to the use of such companies, upon receiving compensation therefor, and the title is thus acquired. It is true the state does not pass title to the beds and waters of its streams, but as an accompaniment of the right to condemn adjacent lands it has directly conferred upon boom companies the right to locate and operate booms in such waters. As a part of the location plan, the plat and survey shall designate not only the lands but the waters desired to be used. The plat when filed becomes notice to the world of the appropriated territory, and while the state requires the upland owner to submit to the use of his lands, it also confers directly upon the locator the right of dominion over the water in aid of the other use. In considering these location rights we, therefore, see no reason for making a distinction between those acquired upon land and those acquired in the waters. The state has not only authorized both, but they are combined rights, having in view a common end, and neither would be useful for accomplishment of that end without the aid of the other. We therefore think the analogy suggested by appellant is forceful, and that the railroad cases cited are useful in aiding us to determine the principles applicable here.

Applying the rule followed in the railroad cases, appellant had the right, after filing its plat of location, to acquire the title to the lands within the limits of its location. It was an absolute right which it could enforce by condemnation proceedings to the exclusion of any other boom company that might seek to appropriate the same land. It did acquire these lands, not by condemnation, but by purchase. Having thus established its location and acquired the necessary lands, it proceeded to construct its boom, but did not construct it throughout the entire located territory, although it has always intended to do so as the public demand might require. We think in reason that the appellant had the right when it filed its plat of location and acquired property for the purpose of constructing its boom, to take into consideration the future requirements of its business, and that it should not be restricted merely to the territory required
630 at the time its first works were erected. It would seem that this must be so in view of the obligations appellant assumed as a public service corporation. The statute requires that it shall

catch, hold, and assort the logs and timber products of *all* persons requesting such service. Section 4381, 1 Bal. Code. Boom companies are also made liable for loss or damages resulting from neglect, carelessness, or unnecessary delay. Section 4384, 1 Bal. Code. If a boom company could not take into consideration the future development and growth of the timber industry in making its location, it would become greatly embarrassed in performing the services for the public required of it by law. Moreover, if in order to anticipate and provide for such development, it can hold its location selected for that purpose only by constructing its boom throughout its entire selected territory, then it is necessary to so construct in the beginning, and the expenditure of large sums of money might thus be required long in advance of any necessity for it in aid of the public service. In the case at bar the sum of $16,000 was expended in the beginning, which seems to have met the demands of that time. The construction throughout the located territory would have required the expenditure of a much larger sum of money without any present necessity for it, and would have exposed the additional constructed material to the action of the water and elements and to consequent deterioration and decay long before it would have been needed for the service of the public. That a boom company must have a discretion in locating its works and in determining the extent of necessary territory for its purposes is recognized in Samish River Boom Co. *v.* Union Boom Co., 32 Wash. 586. It is also held that the question of future needs of railroad companies in fulfilling their charter purposes and performing their public duties as common carriers, is one which should be given full consideration by a court before it undertakes to deprive a company of any part of its right of way in favor of another corporation. Such companies may anticipate future necessities and may for that purpose hold territory not in actual use to the exclusion of other companies.

Western Union Telegraph Co. *v.* Pennsylvania R. Co., 120 Fed. 362.

631 In the Matter of Staten Island Rapid Transit Co., 103 N. Y. 251;

Pittsburg, Ft. Wayne & C. Ry. *v.* Peet, 152 Pa. St. 488;

Appeal of Pittsburg Junction R. Co., 122 Pa. St. 511.

Having thus acquired the first right to construct a boom within its located territory, and having also the right to anticipate future needs of the service it had undertaken for the public, what rights, if any, does appellant have in the remaining territory above its boom as now constructed? It is evident that appellant never intended to abandon any part of its located territory. The court finds that it intended to extend its construction over this territory as necessity required. If there was an abandonment, it must have been by virtue of non-use of the territory in the way of failure to extend and operate the boom thereon. However, in the absence of legislative provision to that effect, mere non-user does not of itself constitute an abandonment. It is held that, without such legislative provision, courts are not justified in fixing a limit at which mere failure to con-

struct shall be held to be an abandonment. Abandonment is a question of intent, and while such intent may be found as a fact from long non-use, yet the non-use itself does not constitute an abandonment and does not of itself defeat or impair acquired rights.

3 Elliott on Railroads, § 931;
Townsend *v.* Michigan Central R. Co., 101 Fed. 757;
Roanoke Investment Co. *v.* Kansas City & S. E. R. Co. (Mo.) 17 S. W. 1000;
Perth Amboy Terra Cotta Co. *v.* Ryan (N. J.) 53 Atl. 699;
Dennison & S. Ry. Co. *v.* St. Louis S. W. Ry. Co. of Texas, (Tex.) 72 S. W. 161;
Welsh *v.* Taylor, 134 N. Y. 450;
Durfee *v.* P. D. & E. Ry. Co., 140 Ill. 435;
Barlow *v.* Chicago, R. I. & P. R. R. Co., 29 Ia. 276;
Memphis & L. R. Ry. Co. *v.* Humphreys (Ark.) 48 S. W. 86;
Eddy *v.* Chace, 140 Mass. 471;
Johnston *v.* Hyde, 33 N. J. Eq. 632.

Appellant has not, therefore, abandoned its location by mere non-use. If it has forfeited its rights therein, it must be due to
632 the operation of law for some further reason. Respondent insists that appellant did not proceed with diligence to construct its extended boom. Lack of proper diligence is an element to consider in determining whether there has been an actual abandonment. The court's finding however shows that the intention to extend the boom as the public service required always existed, and in the absence of a showing that diligence to meet that end was not exercised, we think there was not an abandonment. It is true, as respondent says, the cases hereinbefore cited recognize the necessity for diligence in order to hold location rights. In some of the cases a much longer, and in some a much shorter time elapsed than in the case at bar. What is diligence in any given case must depend upon the particular circumstances. The relation that the delay may bear to the proper past discharge of the locator's duties to the public, as well as the necessity for future needs in the discharge of those duties, should be taken into consideration. Viewed from that standpoint, for reasons already stated, we think there was not an abandonment for mere lack of diligence.

Respondent further contends that there has been a forfeiture by reason of the provision of the boom statute. Section 4378, 1 Bal. Code, contains the following:

"Provided, That any property acquired under the provisions of this chapter by the exercise of the right of eminent domain shall be used exclusively for the purposes of this chapter, and whenever the use of said property as herein contemplated shall cease for a period of one year, the same shall revert to the original owner, his heirs or assigns, upon the repayment of the original cost of same."

The above is from the statute of 1890. A similar provision was included in the statute of 1895, and is found in § 4388, 1 Bal. Code. It will be observed that the reversion declared by the statute is of lands which have been acquired by eminent domain, and it is evi-

dently for the benefit of the land owner who has involuntarily yielded his land for a specific purpose. The provision does not extend to any further rights than those acquired by eminent domain. Appellant acquired no lands within its location in that manner, but all were acquired by purchase. Moreover the provision applies to
633 lands, the use of which shall "cease" for a period of one year. We think the intention of the statute is to require that when lands, which have been actually used for booming purposes, have not thereafter been used for such purposes for the period of one year, there shall be a reversion. The reason for the provision seems to be that if the land has once been applied to the intended use and that use then ceases for a year, it shall be presumed that the necessity for its use no longer exists, and the land owner shall then be entitled to re-enter and occupy it. We do not think the statute applies to lands located with reference to future needs, the actual necessity for the use of which has not yet arisen, but which necessity may reasonably be anticipated.

"The statute provides that when such school house as is required of the town or district 'has ceased' to be thereon for two years, the lot may revert to the owner. Here the house has not ceased to be, nor begun to be, thereon. There must be the beginning before the end. This provision was intended to apply to an occupancy once had and abandoned."

Jordan *v.* Haskell, 63 Maine, 189.

Appellant further urges that, in any event, it is not within the province of respondent to ask a forfeiture, for the reason that the rights of appellant result from a compact or agreement between it and the state, and that inquiry into the question of ferfeiture can only be made by the state, and that, too, in a direct proceeding in the nature of *quo warranto* instituted for that purpose. That is both an interesting and important question, but, in view of what we have already said in reference to the merits of the question of forfeiture in this case, it is unnecessary to pass upon the proposition as to who may ask a forfeiture. The necessary limits of this opinion are already extended, and we are therefore unwilling to pass upon this question now unless it were a necessary factor in the disposal of the case. Appellant further urges that the record shows that the respondent's boom and location are not lawful, in that no sufficient permit has been granted to it by the war department of the United States. For reasons above stated, it is unnecessary that we shall examine that question.

Respondent argues that, if appellant is permitted to hold its location to the exclusion of the former from said territory, it will
634 virtually place appellant in control of a monopoly of the booming business upon North river. What may be the practical effect in that particular is not here for our consideration. We are simply called upon to determine appellant's rights under its location as accorded to it by the state. The legislature has wisely provided to prevent an oppressive monopoly as against the public by limiting the maximum charge that may be made by a boom company to

seventy-five cents per thousand feet. Section 4381, 1 Bal. Code. The record shows that appellant has never charged as much as the maximum rate. Still the legislature, without doubt, contemplated that competition may exist where topographical and geographical conditions will admit thereof and where prior locators, who have in good faith become established, may at the same time be protected in their locations. It is said that the boom statutes contemplate that more than one boom may exist upon the same river. That is true, and thereby the legislature has made clear that it did not intend to authorize an unconstitutional monopoly of a stream. If, however, the available booming extent of a stream be such as to reasonably prevent the operation of more than one boom, the effect of a single location cannot well be avoided. Such circumstances would not make a monopoly authorized by law as such, but the location would become the only one upon the stream by mere force of necessity. In any event, whatever may be the available booming extent of a stream, the legislature undoubtedly intended that those who in good faith venture to spend their money and become established as pioneers upon a stream shall be protected in the rights accorded them by virtue of their compliance with the location statute. It must have intended that, in the consideration of these rights, reference must be had to enlarged commercial necessities and to consequent future demands for public service. If the available extent of a river be such as to reasonably permit the operations of more than one boom company thereon, each will be protected in its location lawfully acquired, but prior rights must be protected. It is possible for a booming company in an effort to hold an entire stream to spread its plat of location over the whole available booming space
635 thereon. If such were the manifest or apparent purpose, without regard to reasonable present and future necessities, it would be an attempted fraud against the state and the public which could not be upheld. Such a purpose does not appear on the part of appellant. Sufficient good faith appears to warrant its being protected in its location. The court finds that appellant's contemplated extension cannot be made and operated by reason of respondent's boom. The two cannot exist together. It follows that respondent is unwarrantably interfering with appellant's location, and that in its booming operations the former must be restricted to territory outside of the latter's location.

We think the court erred in its conclusions of law. The judgment is, therefore, reversed and the cause remanded with instructions to make conclusions of law and enter judgment in accordance with what has been herein said.

HADLEY, *J.*

We concur:
MOUNT, *C. J.*
ROOT, *J.*
CROW, *J.*
DUNBAR, *J.*
RUDKIN, *J.*

636 In the Supreme Court of the State of Washington, Wednesday, December 6th, 1905.

No. 5336.

NICOMEN BOOM COMPANY, Appellant,
vs.
NORTH SHORE BOOM & DRIVING CO., Respondent.

Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the superior court of Pacific county, and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing, it is now on the 6th day of December A. D. 1905, on motion of W. W. Cotton, Esq., of counsel for appellant, considered, adjudged and decreed that the judgment of the said superior court be, and the same is hereby, reversed with costs, the petition for rehearing denied, and that the said Nicomen Boom Company have and recover of and from the said North Shore Boom & Driving Company the costs of this action taxed and allowed at three hundred & thirteen & 20/100 dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance with the opinion herein filed.

382 In the Supreme Court, State of Washington.

No. 5336.

NICOMEN BOOM COMPANY, Appellant,
v.
NORTH SHORE BOOM AND DRIVING COMPANY, Respondent.

Petition for Rehearing.

The respondent respectfully petitions that a rehearing in this cause be granted, and that an oral argument be permitted upon the merits of the cause, and submits in support thereof the following:

1. The decision of this court assumes that the Nicomen Boom Company intended at some future time to occupy and use the area in dispute. No issue of intention was in issue in the trial court, and this respondent was denied the right to offer evidence in rebuttal of such alleged intention.

2. The court assumes that future necessity might require the use of the disputed area by the Nicomen Boom Company. No issue of future necessity was raised by the pleadings, nor was this respondent permitted to offer evidence thereon.

3. The necessary result of the court's decision is to authorize a monopoly by the first boom company platting navigable waters, and the boom statute so construed is void, because in violation of our constitutional provision against the granting of exclusive rights and the conferring of a monopoly.

4. The legal effect of filing a boom plat should be determined by the constructions reasonably given to the boom statute, and not by resort to any supposed analogy between the filing of such a plat and the filing of a railroad plat of location.

5. In any event the respondent has expended a large sum of money, at this time about $20,000, and the rights of every
383 logger upon North river are seriously affected and jeopardized by the decision, which virtually excludes competition and prevents the respondent company from fulfilling its contractual obligations with the several persons and companies operating logging camps. Should the court finally decide that the North Shore boom is an infringement upon the rights of the Nicomen company, permission is respectfully asked to stay the operation of a mandatory injunction so that condemnation proceedings can be maintained and the large amount of money invested be not lost, and thereby in addition securing to the public the rights of competition.

Argument.

Under proposition 1 attention is called to the issues presented by the pleadings. The complaint in substance alleges that on a certain date this respondent commenced to build a boom within a few feet of the Nicomen boom, in such a way as to entirely prevent the use of said Nicomen boom. The Nicomen company in its complaint and at the trial took the position, not that it intended in the future as necessity required to use the area in dispute, but that it was actually using said area. It thus came into court basing its contention and right upon a falsehood. It failed to deal frankly with the court, and this of itself is ground for denying it relief in equity.

Verga *v.* Miller, 15 Atl., 835 (N. Y.).

An inspection of the complaint will show that no question of intention to use is presented thereby. But at the trial the Nicomen company, after making an effort for one or two days to show that it was in actual possession and using the disputed area, shifted its position and then claimed that it intended to use such disputed area. No amendment was made to the complaint, and this respondent objected to the introduction of any evidence upon the question of intention. The trial court, however, although stating that such evidence was, in his judgment, immaterial, permitted the Nicomen company to show its intentions. This evidence consisted of
384 alleged conversations between the various stockholders and officers of the company, and evidence that it attempted to get some piling, and that its pile driver was out of repair, thus necessitating delay. (See Testimony of McGowan, Statement of Facts, 118. Also 166, 167.) The trial court frequently intimated that

such testimony was immaterial. Thus, as bearing on the question of intention, the court held that the original cost of the boom was immaterial. (Statement, 130.) This respondent was also refused the right to show that the true purpose was to avoid competition by preventing another boom being built. (Statement, 135.) The fact that the piling which the Nicomen company attempted to drive upon its alleged extension was only trap piling and rediculously inadequate for boom purposes, the trial court held was immaterial. (Statement, 166, 167.)

The trial court also refused respondent the right to cross-examine M. Linn, manager of the Nicomen company, respecting the sudden and unwonted activity of the Nicomen company as soon as it learned that this respondent was entering the field as a competitor. (Statement, 169, 170.) Also as bearing on the question of intention and question of necessity for extension, the court held that the use of McGowan slough, which was also covered by the plat of the Nicomen company, was immaterial. (Statement, 205, 206.) Again, when this respondent's counsel attempted to cross-examine in order to ascertain whether the alleged intention and contemplated extension of the Nicomen boom were *bona fide* or merely colorable, and for the purpose of serving as the basis for this action, the trial court held that such cross-examination was improper and to no purpose. (Statement, 224.) Throughout the whole of plaintiff's case it is apparent that the trial court considered that an intention to occupy the disputed area on the part of the Nicomen company was immaterial, and that the case should be decided by ascertaining which company actually occupied and used the area first.

Since from the court's standpoint evidence of the Nicomen company's intention was immaterial, the court, when this respondent introduced evidence in defense of its position, repeatedly
385 refused to allow this respondent to show that the Nicomen company never actually intended to use the area in dispute. The court said the question of intention was reserved, and that respondent was consuming unnecessary time in going into what the plaintiff had done since suit was brought, (Statement, 248,) and when we attempted to show that the piling which the Nicomen company was seeking to use for its alleged extension were no more suitable for a boom structure than tooth picks would be, thus going directly to the question of *bona fide* intention, the court said he did not regard it as important enough to take up the time of the court. (Statement, 249, 250.)

As bearing upon the issue of intention and of good faith, and for the purpose of showing that the blanket plat of the Nicomen company was intended merely to exclude competition and give it a monopoly, this respondent sought to show that all the available boom area of North river had been platted by the Nicomen company, and the trial court held that this was immaterial and declined to receive evidence upon the point. (Statement, 334.) Again, as showing that the alleged proposed extension of the Nicomen company was only a sham and colorable, we sought to show the kind of piling ordinarily used for boom purposes; the court held the same to be im-

material. (Statement, 352, 353.) The court also held that proof of the date of ordering piling for said alleged extension was immaterial, and would not let us go into the matter. (Statement, 330.) As showing that the Nicomen company never had a *bona fide* intention of making its alleged extension, we offered evidence showing that when it commenced to drive piling in the disputed area, over a mile above its boom as actually operated, its manager intimated that the same was done for the same purpose as fish traps are "corked." (Statement, 275, 441.)

Again, as bearing upon the *bona fides* of said alleged intention and on the question of future necessity, this respondent claimed the right to show the output of logs in North river. The trial court held the same to be immaterial, and declined to allow us to offer evidence upon that point. (Statement, 365, 366, 387.)

386 Again, when this company offered evidence that it had a contract with every logger upon North river to boom his logs, the trial court held the same to be immaterial, (Statement, 366,) although it had direct and vital connection with the issue of whether there was any future necessity on the part of the Nicomen company. Again, as bearing on the question of intention, of good faith, of whether the Nicomen company sought a monopoly, we attempted to offer evidence showing what the rates charged by the Nicomen company were, and what this company proposed to charge, the court excluded said evidence. (Statement, 369.) And when we offered to show that McGowan asserted that he had a large boom and was getting only a few logs, which bore upon the question of future necessity and intention to extend, the trial court excluded such evidence and held that it was of no importance. (Statement, 372, 373.) We also offered evidence that the Nicomen company had declined to receive or take logs within its plant limits above its boom as actually constructed. The trial court held the same to be immaterial, (Statement, 408,) although it tended to show a disclaimer of right or jurisdiction over the area in dispute, and impliedly tended to rebut the present contention that an extension was contemplated; and we were refused the opportunity of showing that the Nicomen company had a large available storage ground within its plant limits in McGowan slough. (Statement, 409.)

It thus appears that, although the Nicomen company was permitted to offer evidence of asserted intentions, yet this respondent was not allowed to rebut the same; this being for the reason that the trial court thought the question of intention was unimportant, and besides was not in issue. But in its opinion and findings the trial court, probably overlooking the foregoing facts, found that the Nicomen company at all times intended to use the disputed area as necessity required. Had the trial court considered this the turning point of the case, as this court apparently considers it, doubtless this respondent would have been permitted to have made his defense. We thus find ourselves in the peculiar position of having this court decide the case upon an alleged fact found by the trial court

387 on which we were refused the right to offer evidence. Should this court adhere to its opinion as to the legal effect of filing

a plat, we respectfully request that the case be sent back for new trial, so that we may have an opportunity of meeting and resisting the issue of intention and future necessity. On these alleged facts we have never had our day in court.

The trial court refused to allow us to show that the Nicomen company had platted all the available boom area of North river, (Statement, 334,) and this court has intimated in its opinion that the particular effect of conferring a monopoly of the booming business upon the Nicomen company is not here for consideration; and this court gives as a reason that the legislature has wisely provided against oppressive monopoly by limiting the maximum charge that may be made by a boom company to seventy-five cents per thousand feet. This court further suggests that the Nicomen company has never charged over sixty cents. Hence, there is no oppressive monopoly.

Whether sixty cents is an oppressive charge or not is not shown by the record, and we were deprived of the opportunity of making such a showing. The public has a right to competition. The constitution does not authorize a monopoly merely because the same is not oppressive. The constitution forbids the legislature granting a monopoly or exclusive right, but this court by its decision apparently considers that a limitation of the rate which a public servant corporation may charge is all that is intended by the constitution. Whether sixty cents is oppressive or reasonable as a boom charge does not determine the question. If there be only one boom company on a river, the delay in handling logs may be of vastly more importance to loggers than the rate charged. The safety of the logs, their immunity from loss, is often a very important factor, and if competition can be excluded at the option of the first company locating on a river, then those engaged in the logging industry are denied that protection which the constitution guarantees.

388 It is fundamental that the granting of a franchise is strictly construed in favor of the state and the public, and against the grantee. This court, it seems to us, has reversed this salutary rule of construction.

This court justly recognizes that, where there is only one available boom site on a river, then Nature and not the law is responsible for the monopoly of boom rights thus conferred. A different question is presented, however, in this case, for here we were denied the right to show that there was another available site; that the same was locked up by the mere filing of a plat.

Perhaps we should apologize to the court for again calling attention to the fact that the boom statute does not purport to grant an exclusive boom franchise to the first locator. True, it does not limit the area which can be embraced in a boom plat; but if this failure is to be construed as conferring upon the first boom company the right to plat all the area available for boom purposes upon a river, whether it uses the same or not, then to this extent the statute conflicts with the constitution in that it authorizes the acquisition of an exclusive right and is in effect a monopoly. Indeed, this court in its decision has suggested that the legislature intended to protect prior locators

who have in good faith established their locations. The court thus admits that the question of good faith is vital and a proper subject for consideration. Surely, as bearing on the question of good faith in filing a blanket plat, evidence is proper to show that the true design was merely to prevent competition by locking up the unused portion of the platted territory. The court recognizes this in the following language:

"It is possible for a booming company in an effort to hold an entire stream to spread its plat of location over the whole available booming space thereon. If such were the manifest or apparent purpose, without regard to reasonable present and future necessities, it would be an attempted fraud against the state and the public which could not be upheld. Such a purpose does not appear on the part of appellant. Sufficient good faith appears to warrant its being protected in its location."

Again, we insist that we were not permitted to show the
389 lack of good faith in this regard.

A question of great public interest and importance is involved in this case. The public desires competition, and the logging industry will be greatly benefited thereby. The logging and lumbering industry is the great and paramount industry in Western Washington. The construction which this court has placed upon the boom statute tends inevitably to monopoly, and authorizes the prior logging boom company upon any river the right to plat as much as it pleases, and, if it desires, all the available boom area. Intentions are cheap, and in this case the Nicomen company can, with no expense to itself, *intend* to use the disputed area. An intention is a convenient subterfuge. It is hard to disprove intentions which are locked up in the breast of the manager of a corporation. It seems to us the decision of this court is to make the Nicomen boom company the judge of its own rights, and allow its avarice to decide whether it shall have a competitor or not.

The Nicomen company did not pretend to show, nor did the trial court find, that there would ever be any necessity whatever for the use by the Nicomen company of the disputed boom area. If this court will scan the statement of facts, it will find that the Nicomen boom company knew nothing whatever of the probable future output of logs in North River. None of its officers ever talked with any logger operating on the river, about the output. This court has assumed that there is a future necessity, although no claim to that effect was made in the complaint or at the trial.

This court has decided this case upon the supposed analogy existing between the filing of boom plats and the filing of railroad plats of location, and suggests that the legislature intended to furnish such an analogy by enacting § 4378 of 1 Bal. This section provides that boom companies may condemn in the manner provided by law for the appropriation of private property by railways. There is no statute specially providing the manner in which railway corporations
shall condemn. Besides, the statute in this respect, is repealed
390 by necessary implication by 1 Bal. § 4388, which provides for appropriation by boom companies in the manner provided

for by the general statute authorizing the condemnation of property by public service corporations. 2 Bal. § 5637. Hence, it cannot be said the legislature intended any analogy.

We think the boom statute is complete in itself, and that a reasonable construction supports our contention. The statute does not limit the area which may be platted: (1 Bal. §§ 4379, 4389;) but it does limit the exercise of the right of eminent domain to what is necessary. (1 Bal. § 4388.) By implication this limits the scope of a boom plat to the area which is necessary, for if a boom company cannot condemn tide or shore lands which are not necessary to its use, of what avail is it that it plat the same, unless it be, as in this instance, to exclude competition? Again, the court, it seems to us, has construed the purpose of the statute in authorizing a reversion of condemned property, as though the public had no interest at stake, and that the only interest to be subserved was that of the former owner. We think we see in this statute a legislative purpose to prevent the condemnation and holding of boom property without using the same. Probably it would be a matter of little concern to the former owner of the property condemned whether it was used or not; but it might be a matter of most vital concern to the public and to the loggers and to a competing boom company. In any event, the statute aims at the ceasing to use condemned property for boom purposes. The phrase "cease to use" is construed by this court to involve, first, a prior use, and second, an abandonment of that use. This may be good logic, but we feel it is sacrificing the spirit to the letter.

Ever since the trial below this respondent has operated its boom. The record shows that at the time of the trial it sought to prove that it had a contract with every logger on North river to boom his output. The decision of this court vitiates every such contract, and while we do not claim that the existence of such contract is determinative of this case, yet the effect upon the public welfare and the logging industry is a factor which we think a court of equity
391 should consider. The effect of the court's decision is not merely to destroy property costing many thousands of dollars, but at this season of the year it affects the entire logging industry upon North river, and many innocent persons engaged therein who have conducted their business in reliance upon the right of this company to do business. In this equitable case these considerations should be given weight, and even though the court should not consider them sufficient to deny the Nicomen company relief, yet we submit they should be considered in determining as to the character of that relief. The Nicomen company is the lower boom. Its sheer or upper end has always been upon the tide lands owned by this respondent and its grantors. It cannot extend its boom up the river upon the disputed area one foot without continuing and increasing that trespass. In so far as this action was brought to displace the North Shore company and allow the Nicomen company to use the disputed area, relief should be denied for the simple reason that to thus allow the Nicomen company to use said area is to allow it to trespass on the North Shore company's tide lands.

The evidence shows that the North Shore company expended about $10,000 up to the time of trial in building its boom. We would like permission to offer evidence that we have spent that much more since the decision, and that, should a mandatory injunction finally be granted, property of the value of $20,000 will be wiped out of existence. Since this company is also a public service corporation, and the rights of the public are involved in the operation of its business, should this court finally decide that in entering upon the disputed area we were without right and infringed upon the rights of the Nicomen company, and since it is very clear that our boom was built and our money expended in good faith, under the honest belief that we were within our legal rights, we ask either that in this action, since the trial court found that we were solvent, the amount of damages sustained by the Nicomen company on account of our taking or using any of its rights be assessed, and a mandatory injunction granted only upon our failure to pay such damages; or that a mandatory injunction be stayed pending condemnation proceed-
392 ings on our part.

Although in form an injunctive action, in legal effect it is an ejectment suit. Ejectment, it has frequently been held, will not lie against a public service corporation such as a railroad, on account of the disturbance to the public interests, and where ejectment is maintained the courts invariably sustain any judgment which may be rendered for the right to enforce the same until condemnation proceedings can be had. This court has so decided.

Hathaway *v.* Yakima Water Co., 14 Wash. 469;
Slaght *v.* Northern Pacific R. Co., 81 Pac. 1063;
Patterson *v.* Kamlah, 6 Atl. 444;
Kincaid, ——, 24 N. E. 1067.

In the case of Osborne *v.* Missouri Pacific R. R. Co., 37 Fed. 830, where the railway company commenced to build a track upon a street, and the abutting owner applied for an injunction, and pending the suit the track was laid and in daily use, the court held that an injunction would be denied and the complainant would be left to his remedy at law. This decision was affirmed by the federal supreme court. 147 U. S. 248.

This court as a court of equity has the right to take hold of the case and finally end the controversy by securing the payment of adequate compensation to the Nicomen company. A strong case, where the authorities are collated upon this proposition, is that of New York City *v.* Pine, 185 U. S. 93, *et seq.*

This court has recognized that, where the party can be compensated in damages and thus obviate the destruction of property, the party will be left to his remedy at law.

State *ex rel.* Smith *v.* Superior Court, 26 Wash. 291.

Again, by bringing this suit to enjoin the North Shore company, the Nicomen company thereby waived its right to a jury trial to assess the amount of damages, and this court has jurisdiction to determine the entire controversy; and should we ultimately fail to establish

our right to the disputed boom area, we ask the court, either to
393 remand this action for the purpose of having damages assessed by the trial court, or for a stay of mandatory injunction until condemnation proceedings can be waged. That this injunction suit was a waiver of a right to jury trial in a condemnation proceeding is held in the following cases:

Westphal *v.* City of New York, 78 N. Y. Supp. 56;
Sentenis *v.* Ladew, 35 N. E. 650.

The respondent respectfully requests that, upon the merits of this case for the purpose of presenting more fully the question of the legal effect of filing a boom plat, a rehearing be ordered and oral argument permitted.

Respectfully submitted,

W. H. ABEL,
Attorney for Respondent.

394 5336.

Filed Apr. 26, 1907. C. S. REINHART, *Clerk.*

395 In the Supreme Court of the State of Washington.

NICOMEN BOOM COMPANY, Plaintiff and Appellant,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant and Respondent.

Transcript.

In Appeal from Pacific County, Washington.

W. H. Abel and Chas. E. Miller, Attorneys for Defendant and Respondent.

Welsh & Welsh, Attorneys for Plaintiff and Appellant.

396 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM COMPANY, Plaintiff,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant.

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397 In the Supreme Court of the State of Washington, October Session, A. D. 1905.

Be It Remembered, That at a regular session of the Supreme Court of the State of Washington begun and holden at Olympia on the second Monday in October, A. D. 1905, it being the 9th day of said month, among other, the following was had and done, to-wit.

WEDNESDAY, *Dec. 6th,* 1905.

No. 5336.

NICOMEN BOOM COMPANY, Appellant,
vs.
NORTH SHORE BOOM AND DRIVING COMPANY, Respondent.

Judgment.

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Pacific County, and upon the argument of counsel, and the Court having fully considered the same, and being fully advised in the premises, and having filed its opinion in writing, it is now, on this 6th day of December A. D. 1905 on motion of W. W. Cotton, Esquire, of counsel for appellant, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby reversed with costs; The petition for rehearing denied, and the said Nicomen Boom Company have and recover of the said North Shore Boom and Driving Company the costs of this action taxed and allowed at Three Hundred & Thirteen & 20/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance with the opinion herein filed.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, do hereby certify that the foregoing is a true copy of the Judgment and Decree in said cause, as the same now remains of record in my office.

In Testimony Whereof, I have hereunto set my hand affixed the seal of said Court at Olympia, this 6th day of December A. D. 1905.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court, State of Washington.

Filed Dec. 8, 1905.
E. A. SEABORG,
County Clerk.

Recorded by
C. M. SEABORG, *Deputy.*

398 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM CO. (a Corporation), Plaintiff,
vs.
NORTH SHORE BOOM & DRIVING COMPANY (a Corporation), Defendant.

Conclusions of Law.

The above entitled action came on regularly for hearing in open court upon the motion of the plaintiff asking the court to make and enter conclusions of law and a judgment in said action in accordance with the judgment, decision and mandate of the Supreme Court of the State of Washington in said cause.

The plaintiff appearing by W. W. Cotton, James G. Wilson, Welsh Bros. and W. B. Stratton, as its attorneys, and the defendant appearing by W. H. Abel and Hewen & Miller as its attorneys. The said motion was argued by the said attorneys for plaintiff in behalf of plaintiff and by the attorneys for the defendant on behalf of the defendant, and after argument of counsel and the court being fully advised in the premises, and it appearing to the court that heretofore an appeal was taken from this court from the final judgment of this court, which judgment was signed on the 10th. day of March, 1904, and filed in said action in the above named Superior Court, on the 12th. day of March, 1904, and the Court finds that the Supreme Court of the State of Washington on said appeal, did reverse said judgment of the Superior Court heretofore made and entered in the above entitled action, and said Supreme Court of the State of Washington in reversing said judgment, did order in its judgment and decision that the above entitled cause be remanded with instructions to this court to
399 make conclusions of law and enter judgment in accordance with the decision, opinion and mandate of said Supreme Court of the State of Washington, and this court finds from the records herein that said judgment and decision of said Supreme Court of the State of Washington, and the remittitur has been sent down by the Supreme Court of the State of Washington to this court, and the same are now on file and of record herein; and this court is ordered and directed to enter conclusions of law and a judgment herein in accordance with the judgment, decision and mandate of said Supreme Court of the State of Washington.

Now therefore, by reason of the said judgment, decision and mandate of said Supreme Court of the State of Washington, and pursuant to the law, it is hereby considered, ordered, adjudged and decreed that the conclusions of law, being the conclusions of law No-. 1, 2, 3 and 4 which were made and entered on the findings of fact in said cause, by this court on the 12th day of March 1904, be and they and each of them are hereby vacated, set aside and held for naught, and

It is further considered, ordered, adjudged and decreed that on said findings of fact heretofore made and found by this court, that the following conclusions of law be, and the same are hereby found and made:

1.

That plaintiff has a valid and subsisting and prior location for the catching, booming, rafting, sorting and holding of logs, lumber and other timber products, and for the construction, maintenance and operation of its boom on North River, in Pacific County, Washington, and on the waters and shore lines and lands contiguous to said North River and territory of said North River as shown by its plat and survey of location which was filed with the sec-
400 retary of the State of Washington on April 5th, 1900, a copy of which plat and survey was attached to plaintiff's complaint, marked Exhibit "A" and was made a part thereof, and which plat and survey showed the waters and shore lines of said North River and the lands contiguous thereto which plaintiff proposed to appropriate for its boom and booming operations in said North River, and which location of said plaintiff is described as follows, to-wit:

All that portion of North River lying and being in Pacific County, Washington, and more particularly described as follows, to-wit: Commencing at the mouth of North River in Section 26, township fifteen, North of Range Ten. West of Willamette Meridian, and thence running up said river and on and along the meanders thereof on both banks thereof and included between said meanders and the shore lines of the waters and all waters and lands contiguous thereto, and river bed of said North River to a point where said North River intersects the North line of Section twenty three, township 15 North Range Ten. West Willamette Meridian, all being situated in Pacific County, Washington.

Also all those certain tide lands of the second class situated in front of and abutting upon lots 5, 6 and 7 of section 23; and lots 5, 6 and 7 of Section 22; and lots 5 and 6 of Section 27; and lots 1, 2, 3 and 5 of the Amos Smith Donation Land Claim in Section 26, all in township 15 North of Range 10 West of Willamette Meridian in Pacific County, Washington.

2.

That plaintiff has a prior and lawful right to construct, maintain and operate its boom on said North River on all of plaintiff's said location, described in conclusions of law No. 1 hereof, and also upon the tide lands of the second class therein described.

3.

That defendant's boom as constructed, and as now located
401 on said North River in Pacific County, Washington unwarrantably and unlawfully interferes with plaintiff's said location on said North River, and defendant's boom is an unlawful structure. That defendant has no right whatever to erect, maintain, keep or operate any boom whatever on plaintiff's said location

nor on any part of plaintiff's said location, and that the defendant, in any boom or in any booming operations, be restricted to territory outside of plaintiff's aforesaid location, including plantiff's said tide lands described in conclusion of law No. 1 hereof.

4.

That defendant be perpetually and forever enjoined, restrained and prohibited from driving any piles, timbers or any other structure whatever in said North River in Pacific County, Washington, upon plaintiff's aforesaid location, and tide lands which are described in conclusion of law No. 1 hereof; and that defendant be perpetually and forever enjoined, restrained and prohibited from erecting, maintaining and operating any boom or other structure whatever on the aforesaid location of plaintiff in said North River, and from interfering with plaintiff's boom or booming works in any manner whatever in said North River, or the location of plaintiff aforesaid on said North River.

5.

That the plaintiff has a right to make and construct its proposed extension of its boom on said North River and to extend the same throughout and on all of its said location, and its tide lands described in conclusion of law No. one hereof.

6.

That the defendant has no right to maintain or operate that certain boom heretofore constructed by defendant on the aforesaid location of plaintiff.

7.

That plaintiff is entitled to a judgment and decree of this
402 court compelling the defendant to immediately open said boom and to immediately begin to take up and remove that certain boom which it heretofore constructed in North River, Pacific County, Washington, and also all piling, timbers and other structure which defendant heretofore erected and constructed on plaintiff's aforesaid location in North River, in Pacific County, Washington, and that said removal shall be fully completed within three weeks from date, and that plaintiff is entitled to a judgment for its costs and disbursements in this action.

To all of which defendant excepts and its excepton is allowed.

Done in open court this 16th. day of January, 1906.

ARTHUR E. GRIFFIN, *Judge.*

Service of the foregoing conclusions of law are admitted this Sixteenth day of January, 1906.

W. H. ABEL,
Attorney for Defendant.

[Endorsed:] Filed Jan. 16, 1906. E. A. Seaborg County Clerk. Recorded Court Journal Vol. 12 pages 4, 5, 6 and 7.

403 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM CO. (a Corporation), Plaintiff,
vs.
NORTH SHORE BOOM & DRIVING COMPANY (a Corporation), Defendant.

Judgment and Decree.

The above entitled action came on regularly for hearing in open court upon the motion of the plaintiff asking the court to make and enter conclusions of law and a judgment in said action in accordance with the Judgment, decision and mandate of the Supreme Court of the State of Washington in said cause.

The plaintiff appearing by W. W. Cotton, James G. Wilson, Welsh Bros. and W. B. Stratton, as its attorneys, and the defendant appearing by W. H. Abel and Hewen & Miller as its attorneys. The said motion was argued by the said attorneys for plaintiff in behalf of plaintiff and by the attorneys for the defendant on behalf of the defendant, and after argument of counsel and the court being fully advised in the premises, and it appearing to the court that heretofore an appeal was taken from this court from the final judgment of this court, which judgment was signed on the 10th. day of March, 1904, and filed in said action in the above named Superior Court, on the 12th. day of March, 1904, and the court finds that the Supreme Court of the State of Washington on said appeal, did reverse said judgment of the Superior Court heretofore made and entered in the above entitled action, and said Supreme Court of the State of Washington in reversing said judgment, did order in its judgment and decision that the above entitled cause be remanded with instructions to this
404 court to make conclusions of law and enter judgment in accordance with the decision, opinion and mandate of said Supreme Court of the State of Washington, and this court finds from the records herein that said judgment and decision of said Supreme Court of the State of Washington, and the remittitur have been sent down by the Supreme Court of the State of Washington to this court, and the same are now on file and of record herein; and this court is ordered and directed to enter conclusions of law and a judgment herein in accordance with the judgment, decision and mandate of said Supreme Court of the State of Washington, and this court, by reason of said judgment, decision and mandate of said Supreme Court of the State of Washington, and pursuant to the law, did on this date make and enter herein its conclusions of law in accordance with said judgment, decision and mandate of said Supreme Court,

Now therefore, it is hereby considered, ordered, adjudged and decreed that plaintiff has a valid and subsisting and prior location for the catching, booming, rafting, sorting and holding of logs, lumber and other timber products, and for the construction, maintenance and operation of its boom on North River, in Pacific County, Wash-

ington, and on the waters and shore lines and lands contiguous to said North River and territory of said North River as shown by its plat and survey of location which was filed with the secretary of the State of Washington on April 5th, 1900, a copy of which plat and survey was attached to plaintiff's complaint, marked Exhibit "A" and was made a part thereof, and which plat and survey showed the waters and shore lines of said North River and the lands contiguous thereto which plaintiff proposed to appropriate for its boom and booming operations in said North River, and a certified copy of said plat as filed in the office of the secretary of State aforesaid was on this day filed in the office of the clerk of this court as is hereby referred to, and said location of said plaintiff is described as follows, to-wit:

All that portion of North River lying and being in Pacific County, Washington, and more particularly described as follows, to-wit:

405 Commencing at the mouth of North River in Section twenty-six, township fifteen, North of Range Ten, West of Willamette Meridian, and thence running up said river and on and along the meanders thereof on both banks thereof, and included between said meanders and the shore lines of the waters and all waters and lands contiguous thereto, and river bed of said North River to a point where said North River intersects the North line of Section twenty-three, township fifteen, North of Range Ten, West Willamette Meridian, all being situated in Pacific County, Washington.

Also all those certain tide lands of the second class situated in front of and abutting upon lots 5, 6 and 7 of section 23; and lots 5, 6 and 7 of Section 22; and lots 5 and 6 of Section 27; and lots 1, 2, 3 and 5 and the Amos Smith Donation Land Claim in Section 26, all in township 15 North of Range 10 West of Willamette Meridian, In Pacific County, Washington.

It is further considered, ordered, adjudged and decreed that plaintiff has a prior and lawful right to construct, maintain and operate its boom on said North River on all of plaintiff's said location, which location is hereinabove in this judgment particularly described.

It is further considered, ordered, adjudged and decreed that defendant's boom as constructed and as now located on said North River in Pacific County, Washington, unwarrantably interferes with plaintiff's said location on said North River, which location is hereinabove in this judgment particularly described, and defendant's boom is an unlawful structure. That defendant has no right whatever to erect, maintain, keep or operate any boom whatever on plaintiff's said location hereinabove in this judgment particularly described, nor on any part of plaintiff's said location, and that the defendant, in any boom or booming operations on said North River, be restricted to

406 territory outside of plaintiff's aforesaid location including plaintiff's said tide lands of the second class hereinabove in this judgment particularly described.

It is further considered, ordered, adjudged and decreed that the defendant, its officers, agents, servants and employees and all persons acting in aid or assistance of them or by, through or under them be and they are forever enjoined, restrained and prohibited from driving

any piles, timbers or any other structure whatever in said North River, in Pacific County, Washington, upon the location and upon the tide lands of the plaintiff, which location and tide lands are hereinabove in this judgment particularly described, and that said defendant and persons be and they hereby are perpetually enjoined, restrained and prohibited from erecting, maintaining or operating any boom or other structure whatever on the aforesaid location of plaintiff in said North River, which is hereinabove in this judgment particularly described, and from interfering with plaintiff's boom or boom works in any manner whatever in said North River or on said location of plaintiff aforesaid in said North River.

It is further considered, ordered, adjudged and decreed that the plaintiff has a lawful right to make and construct its proposed extension of its boom on and in said North River in Pacific County, Washington, and to extend the same throughout and on all of its said location and tide lands, which location and tide lands are hereinbefore in this judgment particularly described.

It is further considered, ordered, adjudged and decreed that the defendant has no right to maintain or to operate that certain boom or boom structure heretofore constructed by it on the aforesaid location of plaintiff, which location is hereinabove in this judgment particularly described.

It is further considered, ordered, adjudged and decreed that the defendant be and it hereby is ordered, required and directed
407 to immediately open said boom and to immediately begin to take up and remove those certain pilings, timbers, boom or other structures and all other structures which defendant heretofore erected and constructed on plaintiff's location in North River, in Pacific County, Washington, and shall fully remove said boom and timbers within three weeks from this date, and which location of plaintiff is particularly described in that certain plat which is attached to said plaintiff's complaint marked Exhibit "A" and said certified copy of said plat filed in the office of the clerk of this court this day: and that plaintiff have and recover of and from defendant its costs and disbursements in the supreme court taxed at the sum of $313.20, and its costs and disbursements herein is this superior court taxed at the sum of $352.70.

It is further considered, ordered, adjudged and decreed that execution or other lawful writ may issue herein for the inforcement of this judgment in favor of the plaintiff and against the defendant. To all of which defendant excepts and its exception is allowed.

Done in open court this 16th. day of January, 1906.

ARTHUR E. GRIFFIN, *Judge.*

Service of said judgment, by copy, admitted this sixteenth day of Jan. 1906.

W. H. ABEL,
Of Attorneys for Defendant.

Filed Jan. 16, 1906.
E. A. SEABORG,
County Clerk.

Recorded Court Journal, Vol. 12, pages 8, 9, 10, 11.

408 In the Supreme Court of the State of Washington.

NICOMEN BOOM COMPANY, Plaintiff and Appellant,
vs.
NORTH SHORE BOOM & DRIVING CO., Defendant and Respondent.

Supersedeas.

I hereby certify that an appeal has been granted to the Supreme Court of the United States, returnable on Monday, March 19, 1906, from a judgment rendered in this court on the sixth day of December, A. D. 1905, in favor of the appellant, Nicomen Boom Company, and against the respondent, North Shore Boom & Driving Co., reversing the judgment and decree of the superior court of the State of Washington, in and for the County of Pacific, and directing a judgment and decree in favor of the appellant Nicomen Boom Company, in accordance with the prayer of its complaint, and that a supersedeas bond has been executed and filed within sixty days from the date of the said judgment and decree of this court.

Therefore, the appellant, Nicomen Boom Company, and all others are commanded to stay proceedings on said judgment and decree.

Witness my hand and the seal of said court, this nineteenth day of January, A. D. 1906.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

Filed Jan. 19, 1906.
E. A. SEABORG,
County Clerk.

Recorded, Court Journal, Vol. 12, page 13.

409 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Washington, before you, or some of you, being the highest court of law or equity of the said State in which decision could be had in the said suit between Nicomen Boom Company, Plaintiff and Appellant and North Shore Boom & Driving Company, defendant and Appellee, wherein was drawn the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against

the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Nicomen Boom Company, Plaintiff and Appellant, as by its complaint appears, we being — that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and
410 openly, you send the record and proceedings aforesaid, with — things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the twelfth day of May 1907, in the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the thirteenth day of March, A. D. 1907.

[Seal of the United States Circuit Court, Western District of Washington.]

A. REEVES AYERS,
Clerk of the United States Circuit Court for the Western District of Washington,
By SAM'L D. BRIDGES, *Deputy Clerk.*

Filed Mar. 18, 1907.
OREN C. WILSON, *Clerk.*

411 UNITED STATES OF AMERICA, *ss:*

To the Nicomen Boom Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty (60) days from the date hereof, pursuant to a Writ of Error, filed in the Clerk's office of the Supreme Court of the United States of Washington, wherein State of Washington *ex rel.* North Shore Boom & Driving Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the thirteenth day of March, A. D. 1907.

[Seal of the United States Circuit Court, Western District of Washington.]

A. REEVES AYRES,
Clerk of the United States Circuit Court for the Western District of Washington.

Filed Mar. 27, 1907.
OREN C. WILSON, *Clerk,*
By W. E. EDWARDS, *Deputy.*

412 *Sheriff's Return—Personal Service of Summons.*

STATE OF WASHINGTON, *County of Pacific, ss:*

I, A. B. McDonald, Sheriff of Pacific County, State of Washington, do hereby certify that I received the annexed citation in error on the 25th day of March 1907, and I personally served the same on the 26th day of March, 1907, on the Nicomen Boom Company a corporation, it being the defendant in error named therein, by delivering to and leaving with Henry S. McGowan the Secretary of the said Nicomen Boom Company personally, in said Pacific County a copy of said Citation in Error in the action named in said —.

Dated this 27th day of March, 1907.

A. B. McDONALD, *Sheriff,*
By T. H. STEPHENS, *Deputy.*

Sheriff's Fees.

Service	$.60.
Travel	12.00.
	12.60.

Filed Mar. 28, 1907.
OREN C. WILSON, *Clerk,*
By W. E. EDWARDS, *Deputy.*

413 In the Superior Court of the State of Washington for Pacific County.

NICOMEN BOOM COMPANY, Plaintiff and Appellant,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant and Respondent.

Supersedeas Bond.

Know all men by these presents that we, the North Shore Boom & Driving Company, as principal, and J. F. Hobi and J. W. Kleeb as sureties, are held and firmly bound unto the Nicomen Boom Company, in the sum of Twenty Thousand ($20,000) Dollars, lawful money of the United States, to be paid to the said Nicomen Boom Company, or to its certain attorneys, successors and assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, and each of them firmly by these presents.

Sealed with our seals and dated this 13th day of March A. D. 1907.

Whereas, the above named North Shore Boom & Driving Company, hath prosecuted a writ of error in the Supreme Court of the United States to reverse the final judgment and decree of the Superior Court of the State of Washington in and for the County of

Pacific, rendered and entered on the Sixteenth day of January, A. D. 1906, by virtue of the mandate of the Supreme Court of the State of Washington, dated December 6th, A. D. 1905 in the above entitled action.

Now the condition of this obligation is such that if the said North Shore Boom & Driving Company shall diligently prosecute its said writ of error to effect, and, if it fail to make its pleas good, shall answer all damages and costs, and shall do all things enjoined upon it by the said Supreme Court of the United States, then this obligation to be void; otherwise in full force and effect.

NORTH SHORE BOOM & DRIVING COMPANY,
By J. W. KLEEB, *President.*
J. F. HOBI.
J. W. KLEEB.

414 STATE OF WASHINGTON, *County of Pacific, ss:*

J. F. Hobi and J. W. Kleeb, being duly sworn, according to law, each for himself and not one for the other, on his oath deposes and says:

That he is a resident and freeholder within the State of Washington; that he is worth more than double the sum of twenty thousand dollars, over and above all his debts and liabilities in property situated within the state of Washington which is not exempt from sale on execution.

J. F. HOBI.
J. W. KLEEB.

Subscribed and sworn to before me this 13th day of March, A. D. 1907.

[Notarial Seal of Chas. E. Miller.]

CHAS. E. MILLER,
Notary Public in and for the State of Washington, Residing at South Bend, Washington.

I do hereby approve the above supersedeas bond.

HIRAM E. HADLEY,
Chief Justice of the Supreme Court of the State of Washington.

Dated Olympia, Wash., March 16th A. D. 1907.

Filed Mar. 18 1907.
OREN C. WILSON, *Clerk.*

415 *Sheriff's Return—Personal Service of Summons.*

STATE OF WASHINGTON, *County of Pacific, ss:*

I, A. B. McDonald, Sheriff of Pacific County, State of Washington, do hereby certify that I received the annexed Supersedeas Bond on the 25th day of March 1907, and personally served the same on the 26th day of March, 1907, on the Nicomen Boom Company, a corporation, it being the Plaintiff and appellant named

therein, by delivering to and leaving with Henry S. McGowan the Secretary of the said Nicomen Boom Company personally, in said Pacific County, a copy of said Supersedeas Bond in the action named in said —.

Dated this 27th day of March, 1907.

A. B. McDONALD, *Sheriff*,
By T. J. STEPHENS, *Deputy*.

Sheriff's Fees.

Service ..... $ 60
Travel .....

Filed Mar. 28 1907.
OREN C. WILSON, *Clerk*,
By W. E. EDWARDS, *Deputy*.

416 In the Supreme Court of the State of Washington.

NICOMEN BOOM COMPANY, Plaintiff and Appellant,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant and Respondent.

Supersedeas.

A petition for a writ of error having been granted to the Supreme Court of the United States, the said writ of error being returnable on the twelfth day of May A. D. 1907, from a judgment rendered in the Superior Court of the State of Washington, in and for the County of Pacific on the Sixteenth day of January, A. D. 1906, in obedience to the Mandate of the said Supreme Court of the State of Washington, issued on the sixth day of December A. D. 1905, in favor of the appellant, Nicomen Boom Company and against the respondent, North Shore Boom & Driving Company, reversing the former judgment and decree of the said Superior Court of the State of Washington, in and for the said County of Pacific, and directing a judgment and decree in favor of the appellant Nicomen Boom Company in accordance with the prayer of its complaint and the said respondent, North Shore Boom & Driving Company having executed and filed its supersedeas bond in the sum of twenty thousand dollars and the same having been by me approved,

Therefore, the appellant, Nicomen Boom Company and all others are commanded to stay proceedings on said judgment and decree.

Witness my hand this 20th day of March, A. D. 1907.

[Seal of the Supreme Court, State of Washington.]

HIRAM E. HADLEY,
Chief Justice of the Supreme Court of the State of Washington.

Attest:
C. S. REINHART,
Clerk of Said Court.

Filed Mar. 27 1907.
OREN C. WILSON, *Clerk*,
By W. E. EDWARDS, *Deputy*.

417 *Sheriff's Return—Personal Service of Summons.*

STATE OF WASHINGTON, *County of Pacific, ss:*

I, A. B. McDonald, Sheriff of Pacific County, State of Washington, do hereby certify that I received the annexed Supersedeas on the 25th day of March 1907, and personally served *that* same on the 26th day of March 1907, on the within named Nicomen Boom Company, a corporation being the plaintiff and appellant named therein, by delivering to and leaving with Henry S. McGowan the Secretary of the said Nicomen Boom Company personally, in said Pacific County a copy of said supersedeas in the action named in said —.

Dated this 27th day of March, 1907.

A. B. McDONALD, *Sheriff.*
T. J. STEPHENS, *Deputy.*

Sheriff's Fees.

Service	$ 60
Travel	

Filed Mar. 28 1907.
OREN C. WILSON, *Clerk,*
By W. E. EDWARDS, *Deputy.*

418 *Sheriff's Return—Personal Service of Summons.*

STATE OF WASHINGTON, *County of Pacific, ss:*

I, A. B. McDonald, Sheriff of Pacific County, State of Washington, do hereby certify that I received the annexed supersedeas on the 25th day of March 1907 and personally served the same on the 27th day of March 1907 on the Nicomen Boom Company, a corporation, it being the plaintiff named therein, by delivering to and leaving with Hon. John T. Welsh, one of its attorneys of record personally, in said Pacific County, a copy of said Supersedeas in the action named in said Supersedeas.

Dated this 28th day of March 1907.

A. B. McDONALD, *Sheriff.*

Sheriff's Fees.

Service	$ 60
Travel	20
	80

Filed Mar. 28 1907.
OREN C. WILSON, *Clerk,*
By W. E.EDWARDS, *Deputy.*

419 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM COMPANY, Plaintiff,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant.

Præcepi for Transcript.

To the Clerk of said Court:

You will please prepare a transcript of the proceedings had in the above entitled action since the 5th day of December, A. D. 1905, as shown by the various pleadings and proceedings, enumerated below and forward the same, duly certified by you to the Supreme Court of this State at Olympia, accompanying the same with the Writ of Error from the Supreme Court of the United States, filed in your office on the 19th day of January, A. D. 1907:—

1. Mandate from the Supreme Court, dated December 5, 1905.
2. Conclusions of law stated by Judge Griffin filed, January 16, 1905.
3. Judgment of Judge Griffin made on January 16, 1906.
4. Writ of Error from U. S. Supreme Court.
5. Citation in error and service.
6. Supersedeas Bond.
7. Supersedeas.

Dated, South Bend, Wash., April 23, 1907.

W. H. ABEL,
CHAS. E. MILLER,
Attorneys for Defendant.

Filed April 23, 1907.
OREN C. WILSON, *Clerk.*

420 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM COMPANY, Plaintiff,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant.

Clerk's Certificate.

STATE OF WASHINGTON, *County of Pacific, ss:*

I, Oren C. Wilson, County Clerk and Clerk of the Superior Court of the State of Washington, in and for the County of Pacific, do hereby certify that the foregoing transcript of twenty-four typewritten pages, numbered from 1 to 24 inclusive, exhibits and contains full and correct copies of so much of the records and files now on file in this office, as were asked for by the attorneys for the defendant in the above entitled action, in the above entitled action.

In witness whereof, I have hereunto set my hand and affixed the seal of the above named court, this 24th day of April, 1907.

[SEAL.] OREN C. WILSON,
County Clerk and Clerk of the Superior Court of the State of Washington, for Pacific County.

Transcript Filed Apr. 24 1907.
OREN C. WILSON, *Clerk.*

421 In the Supreme Court of the State of Washington.

NICOMEN BOOM COMPANY, Plaintiff and Appellant,
vs.
NORTH SHORE BOOM AND DRIVING COMPANY, Defendant and Respondent.

Application for Writ of Error.

To the Honorable Hiram E. Hadley, Chief Justice of the Supreme Court of the State of Washington:

Your petitioner, the North Shore Boom and Driving Company, defendant and respondent in the above entitled cause, respectfully represents that on the 6th day of December A. D. 1905 a decree was made and entered in this court and cause remitting this cause to the Superior Court of Washington for Pacific County for further proceedings in accordance with the opinion filed herein; that pursuant to said remittitur on January 16, 1906 the said Superior Court of Washington for Pacific County made, rendered, and entered a final decree and judgment against your petitioner North Shore Boom and Driving Company and in favor of the above named Nicomen Boom Company, plaintiff and Appellant, in accordance with the prayer of its complaint, supplemental complaint and findings of fact made in said cause.

And your petitioner further represents that this action involves the question of the right on the part of your petitioner to construct a boom on a navigable river within the United States for the purpose of catching, sluicing, booming and rafting saw logs and other
422 timber products under the act of Congress of September 19, 1890, Chapter 907, (26 St. L. 426), and a permit thereunder from the Secretary of War, your petitioner's rights thereunder having been denied by said final decree and judgment; and also involving the right of the plaintiff Nicomen Boom Company to occupy the same territory and area of a navigable river within the United States for boom purposes under a permit issued under said act of Congress by the Secretary of War unto one, P. J. McGowan; and the assignability thereof to the Nicomen Boom Company.

Wherefore, your petitioner feeling aggrieved, hereby applies for a writ of error from said final decree and judgment, and from the whole thereof, unto the Supreme Court of the United States, and that said writ of error be allowed; and that a transcript of the records

of the proceedings and papers upon which said decree was founded, after due authentication, may be sent to the Supreme Court of the United States, that that honorable court may hear said cause anew and reverse said judgment; and that pending the hearing on said writ of error that a stay of proceedings on said final decree and judgment be granted.

NORTH SHORE BOOM & DRIVING CO.,
W. H. ABEL, *Attorney for Petitioner.*

423 It is now ordered that a writ of error be, and is hereby allowed, and ordered issued as prayed for; and that a stay of proceedings upon said final decree and judgment be, and is hereby granted, pending and until a final determination of said cause upon said writ of error; and the petitioner's bond to secure said stay is hereby fixed at the sum of Twenty Thousand ($20000) dollars.

Dated March 13th, 1907.

HIRAM E. HADLEY,
Chief Justice of the Supreme Court of the State of Washington.

Indorsed: Filed Mar. 13, 1907. C. S. Reinhart, Clerk.

[Endorsed:] Application for Writ of Error.

424 In the Supreme Court of the State of Washington.

STATE OF WASHINGTON *ex Rel.* NORTH SHORE BOOM & DRIVING COMPANY, Plaintiff in Error,
vs.
NICOMEN BOOM COMPANY, Defendant in Error.

Assignment of Errors.

Now comes the said plaintiff in error, and respectfully submits that in the record, proceedings, decision and final judgment of the supreme court of the State of Washington, in the above entitled matter, there is manifest error in this, to-wit:

1. For that the court erred in not finding and deciding that plaintiff in error had a good and valid permission from the Secretary of War to construct its said boom.

2. For that the court erred in finding and deciding that the defendant in error had a good and valid permission from the secretary of war to hold the territory occupied by the boom of plaintiff in error for its contingent future necessities.

3. For that the court erred in not finding and deciding that the permit and license granted by the secretary of war to plaintiff in error to construct its said boom operated as, and was a, revocation of the permit and license previously granted by the secretary of war to construct its said boom.

4. For that the court erred in finding and deciding that at the

time of the commencement of this action the defendant
425 in error was entitled to the possession of, and to hold, the entire area covered by its plat as filed in the office of the secretary of the state of Washington.

5. For that the court erred in finding and deciding that the defendant in error had a right prior to that of the plaintiffs in error, to the area covered by the said boom of plaintiff in error.

6. For that the court erred in not finding and deciding that the defendant in error appropriated only so much of the area included within its said plat as filed in the office of the secretary of the State of Washington, as was, at the time of the filing of the said plat of the plaintiff in error in the office of the secretary of the state of Washington, actually used and occupied by it the defendant in error, for boom purposes.

7. For that the court erred in not finding and deciding that the defendant in error appropriated so much, only of the area of the waters of the said North River as was in actual use by it for boom and rafting purposes at the time it completed its said boom.

8. For that the court erred in reversing the finding and judgment of the superior court of the state of Washington, in and for the county of Pacific.

9. For that the court erred in giving and entering its said judgment in favor of the defendant in error.

10. For that the court erred in giving and entering judgment impairing and violating the rights of the plaintiff in error, under the Fourteenth Amendment of the Constitution of the United States.

W. H. ABEL,
Attorney for Plaintiff in Error.

Indorsed: Filed Mar. 13, 1907. C. S. Reinhart, Clerk.
[Endorsed:] Assignment of Errors.

426 In the Supreme Court of the State of Washington.

NORTH SHORE BOOM AND DRIVING CO., Plaintiff in Error,

—.

NICOMEN BOOM CO., Defendant in Error.

To the Clerk of the Supreme Court of the State of Washington:

Please prepare certified transcript in the above entered case, containing the following files in said case, and transmitting same, so that the same be filed in the clerk's office of the U. S. of the Supreme Court, on or before May 12, 1907.

Complaint, answer, reply, su*bti*-mental complaint, answer to su*b*-mental complaint, reply to answer to su*bti*-mental complaint, findings of fact, conclusions of law, decree, defendant's proposed findings of fact, conclusions of law, defendant's explanations to finding of facts of law and judgment, notice of appeal and admission of service, bond on appeal, brief of North Shore Boom and Driving Co.,

opinion of the Supreme Court of the state of Washington, petition of rehearing filed by North Shore Boom and Driving Co., order denying petition for hearing, mandate to Superior Court of Pacific County, also record transmitted by Superior Court of Pacific County to the Supreme Court of Washington, also application for writ of error, order allowing writ of error by Chief Justice Hadley, assignment of error, writ of error, bond for *for* cost and supersedeo*us* bond, *s*itation, proof of service of *s*itation, order allowing supersedeo*us*, and copy of the precipe, the same to be duly certified under the seal of your office.

W. H. ABEL,
CHAS. E. MILLER,
Attorneys for Plaintiff in Error.

427 In the Supreme Court of the State of Washington.

NORTH SHORE BOOM & DRIVING COMPANY, Plaintiff in Error,
v.
NICOMEN BOOM COMPANY, Defendant in Error.

Clerk's Certificate.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true, and correct transcript of the record in the above entitled cause, and that, in pursuance of the writ of error heretofore filed, in this cause, I herewith transmit the said transcript, together with the original citation and the original writ of error, to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Olympia this 4th day of May, 1907.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

428 *Defective Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Washington, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Nicomen Boom Company, Plaintiff and Appellant, and North Shore Boom & Driving Company, Defendant and Appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United

States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Nicomen Boom Company, Plaintiff and Appellant, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal,
429 distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the twelfth day of May, 1907, in the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the thirteenth day of March, A. D. 1907.

[Seal of the United States Circuit Court, Western District Washington.]

A. REEVES AYRES,
Clerk of the United States Circuit Court for the Western District of Washington.
By SAM'L D. BRIDGES,
Deputy Clerk.

429½ [Endorsed:] Case 1501. 5336. In the Superior Court of the State of Washington for Pacific County. Nicomen Boom Company Plaintiff *vs.* North Shore Boom & Driving Company, Defendant. (4) Filed Apr. 26 1907 C. S. Reinhart Clerk. Filed Mar. 18 1907 Oren C. Wilson Clerk.

429¾ *Sheriff's Return—Personal Service of Summons.*

STATE OF WASHINGTON, *County of Pacific, ss:*

I, A. B. McDonald, Sheriff of Pacific County, State of Washington, do hereby certify that I received the annexed Citation in Error on the 25th day of March 1907, and personally served the same on the 26th day of March, 1907, on the Nicomen Boom Company a corporation, it being the Defendant in Error named therein, by delivering to and leaving with Henry S. McGowan Secretary of the said Ni-

comen Boom Company personally, in said Pacific County a copy of said Citation in Error in the action named in said ——.

Dated this 27th day of March, 1907.

A. B. McDONALD, *Sheriff*,
By N. J. STEPHENS, *Deputy*.

Sheriff's Fees,

Service	$.60
Travel	$12.00
	12.60

[Endorsed:] Filed Mar. 28, 1907. Oren C. Wilson, By W. E. Edwards, Deputy.

UNITED STATES OF AMERICA, *ss:*

To the Nicomen Boom Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty (60) days from the date hereof, pursuant to a Writ of Error, filed in the Clerk's office of the Supreme Court of the State of Washington, wherein State of Washington, *ex rel.* North Shore Boom & Driving Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the thirteenth day of March A. D. 1907.

[Seal of the United States Circuit Court, Western District of Washington.]

A. REEVES AYRES,
Clerk of the United States Circuit Court for the Western District of Washington,
By —— ——, *Deputy Clerk*.

430 [Endorsed:] No. 1501. 5336. In the Supreme Court of the State of Washington. The Nicomen Boom Company, Plaintiff and Appellant, *vs.* North Shore Boom & Driving Company, Defendant and Respondent. Citation in Error to the U. S. Supreme Court. Filed Mar. 27, 1907. Oren C. Wilson, Clerk, by W. E. Edwards, Deputy. Filed May 3, 1907. C. S. Reinhart, Clerk.

431 *Add'l Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Washington before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Nicomen Boom Company, Plaintiff and Appellant and North Shore Boom and Driving Company, defendant and Appellee wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or
432 of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said North Shore Boom & Driving Company, defendant and Appellee as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of March, in the year of our Lord one thousand nine hundred and seven.

[Seal of the United States Circuit Court, Western District of Washington.]

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the Western Dist. of Wash.

Allowed by
HIRAM E. HADLEY,
Chief Justice of the Supreme Court of the State of Washington.

[Endorsed:] 5336. Filed Jun- 10, 1907. C. S. Reinhart, Clerk.

POOR

433 *Copy of Add'l Citation.*

UNITED STATES OF AMERICA, *ss:*

To Nicomen Boom Company, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within Sixty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Washington wherein State of Washington *ex rel.* North Shore Boom & Driving Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Hiram E. Hadley, Chief Justice of the Supreme Court of the Washington State, this 13th day of March, in the year of our Lord one thousand nine hundred and seven.

HIRAM E. HADLEY,
Chief Justice of the Supreme Court of the State of Washington.

Indorsed: Deposited this 10th day of June, 1907. C. S. Reinhart, Clerk Supreme Court.

434 STATE OF WASHINGTON, *County of Thurston, ss:*

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct copy of the citation in the above entitled cause as the same was deposited in my office on the 10th day of June, 1907.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, this 10th day of June, 1907.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

435 In the Supreme Court of the United States.

NORTH SHORE BOOM & DRIVING COMPANY, Plaintiff in Error,
vs.
NICOMEN BOOM COMPANY, Defendant in Error.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above entitled cause, acting by and through their respective counsel, that the printed record heretofore filed in said court in a similarly entitled action between the above named parties, wherein a writ of error was sued out to the Supreme Court of the State of

COPY

Washington, may be filed in this above entitled cause and treated as the plaintiff's record in said cause to March 18, 1906.

It is further stipulated that the above plaintiff's record shall be supplemented by an additional record of matters occur-ing subsequent to said March 18, 1906 and that such additional record shall be printed and the counsel of defendant in error furnished with the usual copies of the same on or before September 30, 1907.

And it is further expressly stipulated by and between the parties hereto that by making and entering into this stipulation, the defendant in error does not waive any rights which it may have to object to the jurisdiction of said court on any ground whatsoever; that the said defendant in error reserves the right to object to the jurisdiction of said Court in any manner it may see fit; and it is expressly understood that the defendant in error shall not be
436 held to have prejudiced itself in any manner whatsoever by reason of this stipulation.

Dated this 25th day of July A. D. 1907.

NORTH SHORE BOOM & DRIVING CO.,
Plaintiff in Error,

By W. H. ABEL,
CHAS. E. MILLER,
PILES, HOWE & FARRELL,
Its Attorneys.

NICOMEN BOOM COMPANY,
Defendant in Error,

By W. W. COTTON,
WELSH & WELSH,
JAMES G. WILSON,
Its Attorneys.

437 [Endorsed:] File No. 20,762. Supreme Court U. S. October Term, 1907. Term No. 359. North Shore Boom & Driving Co., Pl'ff in Error, *vs.* Nicomen Boom Co. Stipulation as to record. Filed Sept. 19th, 1907.

Endorsed on cover: File No. 20,762. Washington supreme court. Term No. 359. North Shore Boom and Driving Company, plaintiff in error, *vs.* Nicomen Boom Company. Filed June 17, 1907. File No. 20,762.

NO. 20,762.

In the Supreme Court of the United States

OCTOBER TERM, 1908.

North Shore Boom & Driving Company, *Plaintiff in Error,* vs **Nicomen Boom Company,** *Defendant in Error.*	No. 359.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This action is pending here on writ of error to the Supreme Court of the State of Washington, which reversed the decree of the Superior Court of the State of Washington, in and for the County of Pacific, and directed that Court to render a judgment for the plaintiff in accordance with the prayer of the complaint. A motion to dismiss the appeal was submit-

ted to this Court on January 20, 1908, and briefs were filed in support of and opposition to the motion. The Court took this motion under consideration and entered an order reserving its decision until after the case should be heard upon its merits.

This action presents a controversy between two boom companies as to the respective right to occupy a certain portion of the navigable waters of North River, in Pacific County, Washington, an arm of the sea in which the tide ebbs and flows, each claiming the right of occupancy to the exclusion of the other.

The Legislature of the State of Washington has enacted certain statutes, authorizing the construction of booms and the driving of logs, which are as follows:

Sec. 4378-B. C. Any corporation heretofore or hereafter organized in the State of Washington for the purpose of catching, booming, sorting, rafting, and holding logs, lumber or other timber products, shall have power to acquire, hold, use and transfer all such real and personal property or estate, by lease or purchase, as shall be necessary for carrying on the business of said corporation. If such corporation shall not be able to agree with persons owning land, shore rights, or other property sought to be appropriated, as to the amount of compensation to be paid therefor, the compensation therefor may be assessed and determined and the appropriation made in the manner provided by law for the appropriation of private property by railways: *Provided*, that any property acquired under the provisions of this act by the exercise of the right of eminent domain shall be used exclusively for the purposes of this act; AND WHENEVER THE USE OF SAID PROPERTY AS HEREIN CONTEMPLATED

SHALL CEASE FOR A PERIOD OF ONE YEAR, the same shall revert to the original owner, his heirs or assigns, upon the repayment of the original cost of same.

P. C. 7111; B. C. 4378. I. H. C., 1590.

Sec. 4379-B. C. Any corporation hereafter organized for the purpose mentioned in section one of this act shall, within ninety days after its articles of incorporation have been filed, proceed to file in the office of the Secretary of State a plat or survey of so much of the shore lines of the waters of the state and lands contiguous thereto as are *proposed to be appropriated* for said purpose by said corporation. Any corporation heretofore organized in the Territory of Washington for any of the purposes expressed in section one (1) of this act, shall file such plat within ninety days after the passage of this act. Such plat shall be made from the records of the United States in the Surveyor-General's office of this state, or by a competent surveyor, subsequent to actual survey.

P. C. 7112; B. C. 4379; I. H. C. 1691.

Sec. 4380-B. C. Such corporations shall have power and are hereby authorized, in any of the waters of this state or the dividing waters thereof, to construct, maintain and use all necessary sheer or receiving booms, dolphins, piers, piles or other structure necessary or convenient for carrying on the business of such corporation. *Provided*, That such boom or booms, sheer booms or receiving booms, shall be so constructed as to allow the free passage between any of such booms and the opposite shore for all boats, vessels or steam crafts of any kind whatsoever, or for ordinary purposes of navigation.

P. C. 7113; B. C. 4380; I. H. C. 1592.

The state statutes as to driving companies are found in Pierces's Code of 1905, Sections 7120 to 7127, inclusive. Section 7126 is as follows:

Sec. 7126. Should any corporation neglect for the period of eight months after improving any stream or river, to operate its dams, or to otherwise perform its duties as herein provided, then all rights herein conferred upon such corporations upon such streams or rivers, or any portion thereof, shall cease.

On March 19, 1900, the defendant in error was duly organized and incorporated as a boom company under these statutes and on April 5, 1900, it filed in the office of the Secretary of State of Washington, its plat and survey, showing so much of the shore lines and waters of North River and land contiguous thereto as it proposed to appropriate under the boom statutes of the State of Washington. (Findings of Fact 1, Record p. 310).

Before beginning the construction of its boom, the defendant in error submitted to the Secretary of War of the United States, a plan of its proposed improvements and a plat of the territory to be occupied thereby, and was granted permission by the war department to construct a boom within the limits of North River, covered by said plan of location. (Findings of Fact III, record p. 311).

Thereupon the defendant in error erected boom works along the left side of the river, going down stream, but in completing its boom, stopped far short of the upper end of the territory covered by its plat of location. Its boom completed by the driving of a succession of dolphins connected by boom sticks with a rudder sheer to catch logs, the same being

more than a mile below the upper end of its located territory, it entered into the business of booming logs. (Findings of Fact IV. and V., Record pp. 311-2).

On August 26, 1903, the plaintiff in error was incorporated under the boom statutes of the State of Washington and on the same date, filed in the office of the Secretary of State of Washington, its plat, prepared in the manner prescribed by law, showing so much of the waters and shore lines and lands contiguous as it proposed to appropriate for boom and driving purposes under its articles of incorporation and the said statutes. (Findings of Fact VI., Record p. 312).

Prior to beginning the erection of its boom the plaintiff in error procured permission from the Secretary of War of the United States, to build a boom within the limits of its said plat of location, which said permission, according to the usual practice of the war department, was evidenced by the following letter to the assignor of the plaintiff in error:

"B. O. UNITED STATES ENGINEER OFFICE.

Seattle, Washington, March 23, 1903.

Mr. John F. Hobi, South Bend, Wash.

Dear Sir: Referring to your application of February 7, 1903, for permission to construct and maintain a boom for storage of logs in North River, Pacific county, Wash., the secretary of war directs that you be informed (that the war department will interpose no objection to its construction and maintenance in the manner proposed, so long as it does not unreasonably interfere with navigation.)

"By direction and in the absence of Major Millis.

"Very respectfully,
JAMES H. MURPHY, Chief Clerk."

(Finding of Fact VII., Record p. 312).

The plat of location filed by plaintiff in error as above stated covered substantially the part of the territory embraced in the plat of defendant in error, lying above the boom works and the sheer boom as constructed by the defendant in error. Immediately after filing its plat the plaintiff in error constructed its boom within the limits of its said located territory along the right bank of North River, but 1500 feet above the rudder sheer of defendant in error, and began operating as a boom company. (Findings of Fact XII., Record p. 314).

The construction of the two booms was practically the same, excepting as to the sheer boom. The sheer boom of defendant in error was a rudder sheer, while the sheer boom of the plaintiff in error at the upper end of its works, consisted of a stationary dolphin erected above the line of the dolphins constituting the main boom and on the opposite side of the river therefrom about fifteen feet from the bank. There was a gap between this sheer boom and the upper dolphins of the main boom sufficiently wide for the passage of all water craft plying on the river. Both sheer booms were constructed to intercept logs coming down the river. (Findings of Fact X., Record pp. 313-4).

The plaintiff in error constructed its boom on the opposite side of the river from that of defendant in error and in such construction the former did not appropriate or use any part of the up-lands or tide lands belonging to the defendant in error. (Findings of Fact XII., Record p. 314).

The sheer and receiving booms of plaintiff in error were so constructed as to allow free passage between the same and the opposite shore for all boats, vessels or steam craft that ply on the river and for the ordinary purposes of navigation. North River is a meandered and navigable stream both above and below the lines of the territory covered by the plat of plaintiff in error and the tide rises and falls for a mile or more above the uppermost end thereof. The operation of the boom of plaintiff in error did not interfere with the operation of the boom of defendant in error. (Findings of Fact XIII., XIV. and XVII., Record pp. 314-5).

On September 16, 1905, the defendant in error began this action by filing its complaint in the Superior Court of Pacific County and after setting up the facts of the organization of the two boom companies, the construction of the boom of the defendant in error and that the plaintiff in error was about to construct a boom upon its said located territory, it prayed that the plaintiff in error, be restrained from constructing a boom upon the territory located by it and within the territory of defendant in error. A temporary restraining order, with a bond in the sum of five hundred dollars was granted by a court commissioner. Upon the hearing to make the temporary restraining order permanent, *pendent lite*, this bond was by order of said Superior Court, increased to the sum of three thousand dollars in default of the giving of which the temporary restraining order was to be considered vacated. The increased bond was never given by the defendant in error as directed by the court and the plaintiff in error proceeded to construct its boom according to its original plans. After the construction of the

boom of the plaintiff in error and after it had began operations and just prior to the trial of this case on its merits, to-wit, on December 1, 1903, the defendant in error filed a supplemental complaint, setting up the acts of the plaintiff in error since the commencement of said action, including the construction of its boom and operation of the same, which concludes with the following prayer:

"WHEREFORE, the plaintiff prays for judgment as prayed for in its original complaint, and in addition thereto, that the defendant be required to take up and remove all of the piling, timber and structures, and booms, which it now has in said North River, within Pacific County, Washington. (Record pp. 301-2).

The plaintiff in error entered a general denial to the complaint and supplemental complaint.

The trial of the action was begun on December 1, 1903, before the Honorable R. B. Albertson, one of the Judges of the Superior Court of the State of Washington, presiding in the Superior Court of Pacific County, and the court, after hearing the evidence and proofs, on January 15, 1904, rendered a written opinion, (See Record pp. 269-282), and directed the entry of certain findings of fact and conclusions of law, (See Record pp. 310-316), and on March 10, 1904, the Court rendered its decree that the application of defendant in error for an injunction, be denied and the action dismissed. (Record, p. 316).

The defendant in error, thereupon, appealed from the decision of Judge Albertson to the Supreme Court of the State of Washington, which latter Court, after hearing such appeal, rendered its judgment on December 6, 1905, reversing the judgment of the Superior Court, denying a petition for re-hearing

and directing that the said Superior Court proceed in accordance with the opinion previously filed. (Record p. 381). The opinion of the Supreme Court of the State of Washington is found on pages 372-380 of the record.

Thereupon, the trial court re-stated its conclusions of law and made and entered its decree, adjudging the defendant in error entitled to the possession of the entire river from its mouth and for a sufficient distance up stream to cover the located territory of both companies and excluded the plaintiff in error therefrom, without exception. On January 17, 1906, on application of plaintiff in error, Chief Justice Mount of the Washington Supreme Court allowed a writ of error to this court, directed to the judgment of the Supreme Court of the State of Washington, and ordered that said judgment should be superseded upon an approved bond in the sum of ten thousand dollars, which was duly given.

A return was made to this court, the record was printed and the final hearing was fixed for March 11, 1907. Returnable on the same day was a motion made by defendant in error asking that said writ be dismissed on the ground, among others, that the said judgment of the Washington Supreme Court to which it was directed, was not a final judgment and the plaintiff in error procured the dismissal of its said first writ of error.

On March 13, 1907, two days later, the plaintiff in error made application to Chief Justice Hadley of the Washington Supreme Court, for its second writ of error, but directed to the judgment of the trial court, made and entered on January 16, 1906, in obedience to the mandate of said Supreme Court. The record being in the State Supreme Court, the

return to this writ of error was made by that court. Chief Justice Hadley also granted an order of supersedeas, conditioned upon an approved bond of $20,000, which was duly given.

On July 25, 1907, the parties to this action by their respective attorneys, entered into a written stipulation, duly filed in this court, to the effect that, so far as applicable, the printed record filed under the first writ of error, should have added the proceedings subsequent thereto, and the same should constitute the printed record upon the second writ of error. The printed record was duly filed in this court in accordance with this stipulation.

ASSIGNMENT OF ERROR.

The plaintiff in error respectfully submits that in the record, proceedings, decisions and final judgment of the Supreme Court of the State of Washington in the above entitled matter, there is manifest errer in this, towit:

1. For that the court erred in not finding and deciding that plaintiff in error had a good and valid permission from the Secretary of War to construct its said boom.

2. For that the court erred in finding and deciding that the defendant in error had a good and valid permission from the Secretary of War to hold the territory occupied by the boom of plaintiff in error for its contingent future necessities.

3. For that the court erred in not finding and deciding that the permit and license granted by the

Secretary of War to plaintiff in error to construct its said boom operated as, and was a, revocation of the permit and license previously granted by the Secretary of War to construct its said boom.

4. For that the court erred in finding and deciding that at the time of the commencement of this action the defendant in error was entitled to the possession of, and to hold, the entire area covered by its plat as filed in the office of the Secretary of the State of Washington.

5. For that the court erred in finding and deciding that the defendant in error had a right prior to that of the plaintiff in error, to the area covered by the said boom of plaintiff in error.

6. For that the court erred in not finding and deciding that the defendant in error appropriated only so much of the area included within its said plat as filed in the office of the Secretary of the State of Washington, as was, at the time of the filing of the said plat of the plaintiff in error in the office of the Secretary of the State of Washington, actually used and occupied by it, the defendant in error, for boom purposes.

7. For that the court erred in not finding and deciding that the defendant in error appropriated so much, only of the area of the waters of the said North River as was in actual use by it for boom and rafting purposes at the time it completed its said boom.

8. For that the court erred in reversing the finding and judgment of the Superior Court of the State of Washington, in and for the County of Pacific.

9. For that the court erred in giving and enter-

ing its said judgment in favor of the defendant in error.

10. For that the court erred in giving and entering judgment impairing and violating the rights of the plaintiff in error, under the Fourteenth Amendment of the Constitution of the United States.

ARGUMENT.

JURISDICTION OF THIS COURT.

By the Seventh Section of the River and Harbor Act, passed by Congress and approved September 19, 1890, Chapter 907, 26 Stat. at L. 426, 454, it was provided as follows:

"That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the con-

struction of any bridge, bridge-draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any state, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable waters of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge-draw, bridge piers, and abutments the construction of which has been heretofore duly authorized by law, or to be so construed as to authorize the construction of any bridge, drawbridge, bridge piers and abutments, or other works, under an act of the legislature of any state, over or in any stream, port, roadstead, haven, or harbor, or other navigable water not wholly within the limits of such state."

Section ten of the Act of Congress of March 3, 1899, C. 425, Sec. X., 30 Stat. at L. 1151, is as follows:

"That the creation of any obstruction, not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States, is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, bulkhead, breakwater, jetty, or other structure in any port, roadstead, haven, harbor, channel, navigable river or other water of the United States, outside established harbor lines, or where no harbor lines have been established, excepting on plans recommended by the Chief of Engineers

and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, channel, lake, harbor of refuge, or enclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to the beginning of the same."

Both boom companies were incorporated after the passage of these several Acts of Congress and both recognized the authority of Congress by securing permission from the Secretary of War to erect their respective boom structures.

Prior to the Act of Congress, already referred to, the earlier cases had, undoubtedly laid down the doctrine that, in the absence of legislation by Congress, a state might authorize a navigable stream, within its limits, to be obstructed by a bridge, dam, boom, or other structure calculated to assist commerce.

Wilson vs. Blackbird C. M. Co., 2 Pet. 245.
Pound vs. Turck, 951 Um. S. 459.
Gilman vs. Philadelphia, 3 Wall. 713.
Cardwell vs. Am. R. B. Co., 113 U. S. 205.

The decision of these cases and those similar, of which there are many, all considered that the paramount authority over the navigable streams of the United States was vested in Congress, but in all cases where Congress had failed to act and had not undertaken to exercise its authority, the state might, in the meantime, exercise this control, the theory being, as announced in a number of the cases, that the

state would do less harm than good. The Acts of Congress of 1890 and 1899, however, were a declaration, that the paramount authority was vested in Congress and that thereafter the Federal Government would exercise, exclusive domain over all navigable waters and ever since that time the Secretary of War has maintained strict surveillance over these waters. Hence, the right of any person or corporation to occupy the navigable waters of the United States, such as in question here, is wholly a Federal question.

The statute of 1890 was construed by this court in the case of United States vs. Bellingham Boom Company, 176 U. S. 218, and upon the subject of the nature of the question involved in that case we cannot do better than to quote the opinion of the court, delivered by Mr. Justice Peckham:

"If there were no Federal law in existence, then the question whether the boom was authorized by a state law, or complied with its provisions, would be a state question, as is clearly set forth in the above extract. But the Federal law has been passed. The question then is whether the structure is permitted by these laws, and when that law says it may continue, if affirmative authorized by a state law, the question whether it is so authorized becomes in effect a question whether the Federal law does or does not permit it. IF IT IS AUTHORIZED BY THE STATE LAW, THEN THE FEDERAL LAW PROVIDES THAT IT MAY CONTINUE, AND WHETHER IT IS OR IS NOT, BECOMES A QUESTION FOR THE FEDERAL COURT TO DECIDE."

At the time of the passage of the Act of 1890, the boom in controversy in the Bellingham case had

been already constructed and the authority of the United States was resisted in that case because it was claimed that the boom had been constructed by state authority and had therefore been duly authorized. In the case at bar, both Acts of Congress, to-wit, those of 1890 and 1899, had been enacted and were in full force at the time plaintiff in error and defendant in error were incorporated, constructed their booms and engaged in the business of booming logs.

Clearly, under these Federal statutes there could be no lawful occupancy of the navigable waters of the United States without permission from the Secretary of War, and hence, any dispute between opposing parties as to such right of occupancy is necessarily a Federal question.

The case of Cummings vs. Chicago, 188 U. S. 410, involved the right to construct a dock in a navigable river by riparian owners having the Federal assent, but in opposition to a police regulation by the State of Illinois. The plaintiffs, citizens of Illinois, filed their bill to enjoin the City of Chicago from interfering with the construction of the dock in Calumet River. The defendant demurred to the bill upon the grounds that it did not state facts entitling the plaintiffs to the relief asked and that no Federal question was involved. In denying this contention, Mr. Justice Harlan, in his opinion, used the following terse language:

"We hold that the circuit court had jurisdiction in this case. That the parties, plaintiffs and defendants, are citizens of the same state, is not sufficient to defeat the jurisdiction; for by the act of March 3rd, 1887, Chapter 373, as corrected by the act of August 13, 1888, Chapter 866, the circuit courts have jurisdiction, without reference to the citizenship of the parties, of all suits at common law or in

equity arising under the constitution or law of the United States.

24 Stat. at L. 552, 25 Stat. at L. 433. (U. S. Comp. Stat., 1901, p. 508).

The present suit does arise under the constitution and laws of the United States, because the plaintiffs based their right to construct the dock in question upon the Constitution of the United States, as well as upon certain Acts of Congress and the permit (so called) of the Secretary of War, which legislative enactment and action of the Secretary of War were, it is alleged, in execution of the power of Congress, under the Constitution, over the navigable waters of the United States. Clearly such a suit is one arising under the Constitution and Laws of the United States. That it is a suit of that character appears from the bill itself. The allegations which set forth a Federal right were necessary in order to set forth the plaintiffs' cause of action."

It was necessary for the defendant in error to allege in its complaint that before constructing its boom, it had acquired the permission of the Secretary of War to that end. The consent of the Secretary of War must continue to make such occupancy valid. These matters were the foundation of the right of the defendant in error to construct and operate its boom. They are rights given by the Federal statute and undeniably the legal effect presents a Federal question and none other.

The findings of fact, made and entered by the trial court, found on page 310 of the printed record, constitutes the pleadings and case upon which a trial *de novo* was had before the Supreme Court of Washington according to the practice in that state:

Codwell vs. First Natl. Bk., 3 Wash. 196.
Stanger vs. Roeder, 3 Wash. 419.
Boyer vs. Boyer, 4 Wash. 81.
Kirby vs. Collins, 6 Wash. 297.
Kane vs. Kane, 35 Wash. 573.
Caughey vs. Rien, 37 Wash. 298.
Nicomen Boom Co. vs. N. S. Boom & D. Co., 40 Wash. 315.

Paragraph III. of the findings of fact, page 311 of the printed record, recites that before beginning the construction of its boom the defendant in error was granted permission by the war department to construct the same; and paragraph VII., printed record, page 312, recites that plaintiff in error had a similar permission. Both parties showed cognizance of the Federal statute and thus recognized and acknowledged the necessity of a license from the Federal authority, thereby conceding that the abstract right to occupy the navigable waters of the United States was based upon Federal assent. In its opinion, printed record, page 372, line 16, the Supreme Court of Washington, referring to defendant in error, makes the following statement:

"* * * * * Before beginning the construction of its boom, it submitted to the Secretary of War of the United States, a plan of its proposed improvements and a plat of the territory to be occupied thereby and was by said war department, granted permission to construct a boom within the limits of said river, covered by said plat of location. The territory designated by said plat of location, embraces the shores of North River, which river is tributary to Willapa Harbor, a bay leading into the Pacific Ocean, and the territory extends from near the mouth

of the river on both sides for some distance up the stream."

Upon the same subject and referring to the plaintiff in error the court uses this language at page 373 of the printed record, line 11:

"It also claims that before commencing to construct its boom it secured from the war department of the United States, permission to construct within its location. The plat of location filed by the defendant in the office of the Secretary of State, covered substantially the part of the territory embraced in the plat of the plaintiff, lying above the upper end of the sheer boom constructed by plaintiff, aforesaid."

And it further appears from the opinion, (page 379, line 14, of the printed record,) that the court declined to consider whether plaintiff in error had permission from the Secretary of War to construct its boom, or not.

It thus clearly appears that the parties invoked the Federal authority and that the court below, necessarily, considered the Federal statute in rendering its decision.

Further, this court has held that the erection of a structure in a navigable river within the limits of a state depends upon the concurrent or joint assent of both the National Government, and the State Government where the question of the enforcement of a police regulation of the latter is involved. The Secretary of War under the authority conferred by Congress, may assent to the erection of such a structure by private parties. Without this assent the structure cannot be erected.

Cummings vs. Chicago, 188 U. S. 410.

Montgomery vs. Portland, 190 U. S. 89.

As the authority over the navigable waters of the United States is paramount in Congress and any voice in their control by the state is only by sufferance and by the grace of Congress, now withdrawn by the acts of 1890 and 1899, already referred to, as to what constitutes the assent of a state, to be concurrent with National assent, is *ipso facto* a Federal question. There is no logic in the position that the assent of the state, in such a case, is purely a local matter to be decided by the state courts and that in any such controversy the United States Courts can decide only whether there has been the necessary Federal assent.

The third assignment of error is, in effect, that when the Secretary of War gave the plaintiff in error permission to construct its boom, such act was a revocation of so much of the permit or license granted to the defendant in error three years before, as was covered by or included in the permit or license granted to the plaintiff in error, aforesaid.

The authority of the Secretary of War under the Acts of Congress of 1890 and 1899, the effect of his assent to the erection of structures in navigable waters and the estate granted thereby, whether revocable, and if revocable whether revocable by implication, and whether such assent carries with it vested rights are, from their very nature, all Federal questions and can only be decided by any court by construing the said Federal statutes.

It was the contention of the plaintiff in error that the Nicomen Boom Company had appropriated only so much of its located territory as it had reduced to actual possession and used for boom pur-

poses, and that having allowed the remaining territory to lie idle, unused and unappropriated, it had abandoned the same, and hence, whatever its original rights, it did not have the state assent, that is, the state assent had not continued, at the time the plaintiff in error made its location.

But, the exception in the Act of Congress of 1899 is a structure authorized by a state law. In any case in which the Secretary of War might be called upon to exercise his authority under this statute, he must assertain *first*, whether the state has taken jurisdiction, and, *second*, whether the conditions prescribed by the state had been complied with and amounted to an assent. If the Secretary of War must decide these matters before he can act and to cover his action, they must be solely Federal questions. In this case, if the Secretary of War granted a license to the plaintiff in error to construct its boom within territory not actually appropriated by the defendant in error, unused by it and not in its possession, he must have decided that the defendant in error did not have the state assent at that time, whatever may have been the case three years before. If the territory occupied by the boom of plaintiff in error was unappropriated at the time it made its location, then it had the state assent, as the state boom law, is self-executing. The Washington Supreme Court held that the filing of a boom plat was analogous to the filing of a plat for right of way by a railroad corporation which would hold the location until actual abandonment and that therefore the defendant in error had the state assent and that plaintiff in error could not have such assent. This was the sole question in the case, as decided by the Supreme Court of the State of Washington, and

from its very nature could only be a Federal question.

Blythe vs. Hinckley, 180 U. S. 333.
American Sugar Co. vs. Louisiana, 179, U. S. 89.
Douglass vs. Wallace, 161 U. S. 346.

While the Act of Congress of March 3, 1899, section X., places the control of the navigable waters of the United States wholly in the hands of the Secretary of War, it will be noted that the exception as to structures, previously authorized by a state, is entirely omitted from the later act. This shows conclusively that so far as the abstract right to navigate the waters of the United States is concerned, it was regarded by Congress, and so declared to be, solely within its jurisdiction. Both of these booms were constructed subsequent to March 3, 1899, and the rights of either company could emanate only from Federal authority and the question thus becomes, wholly, a Federal question. As we have seen, the navigable waters of the United States are solely under the control of Congress and are not at the disposal of a contiguous state. The state may exercise any reasonable police power, and its courts may exercise jurisdiction over maritime controversies, *in personam*, but beyond this the authority of the state cannot go.

The decree of the Supreme Court of the State of Washington awards to the defendant in error, not the located territory provided by the state boom statute leaving an unobstructed passage-way for commerce, BUT THE ENTIRE RIVER FROM ITS MOUTH TO THE HEAD OF TIDE WATER, and excluded the plaintiff in error therefrom, without exception, notwithstanding the fact that it is, also, a

driving company and in spite of the inhibition of the state constitution against the granting of exclusive rights and the conferring of monopolies.

The decree vests the defendant in error with a monopoly upon one of the most important highways on the Pacific Coast and is in violation of the 14th Amendment to the Constitution of the United States.

That the decree violated this amendment to the Constitution of the United States in this respect was specially urged in the petition for re-hearing and was denied by the court and thus a second Federal Question was presented.

Minn. & St. L. R. Co. vs. Minn. 193 U. S. 53.

JURISDICTION—HOW APPARENT.

In Armstrong vs. Athens County, 16, Pet. 281, this court states the principles by which its jurisdiction is governed in six paragraphs, the last of which reads as follows:

"*Sixth.* It must appear from the record that the question was necessarily involved in the decision; that the state court could not have given the judgment or decree which they have passed, without deciding it."

This is the leading case upon the subject of jurisdiction and it is cited in many subsequent cases, notably in the following:

Moore vs. Mississippi, 21 Wall. 638.
Murray vs. Charleston, 96, U. S. 442.
Crossley vs. New Orleans, 108, U. S. 105.
Weatherby vs. Bowie, 131, U. S. CCXV.
Kaukauna vs. Green, B. C., 142, U. S. 69.
Gulf etc. R. R. vs. Howes, 183, U. S. 269.

In Murray vs. Charleston, 961, U. S. 442, the rule is still more forcibly stated as follows:

"The true test of the jurisdiction of this court over state judgment is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided and decided adversely to the Federal right."

Anderson vs. Carkins, 135 U. S. 483.

If it appears from the record by clear and necessary intendment that the Federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient to give jurisdiction.

Powell vs. Brunnswick Co., 150 U. S. 433.

It is not necessary that the treaty or Act of Congress on which the Federal right is based, should have been pleaded specially or spread upon the record. It is sufficient if the record shows that it must have been construed.

McCullough vs. Virginia, 172, U. S. 118.

Where a decision by the state court of the Federal question appears to have been the foundation of the judgment, a writ of error lies.

Wedding vs. Weyler, 192, U. S. 573.

Other cases in point, deciding the general principle here contended for, are the following:

Covington vs. Sanford, 164 U. S. 573.
Mitchell vs. Clark, 110 U. S. 645.
Boyd vs. Nebraska, 143 U. S. 180.
Des Moines vs. Iowa H. Co., 123 U. S. 555.
Erie R. Co. vs. Purdy, 185 U. S. 148.
Snell vs. Chicago, 152 U. S. 191.
Muter vs Montgomery, 156 U. S. 385.

Walter A. Wood Co. vs. Skinner, 139 U. S. 295.

Cook Co. vs. Calument Dock Co., 138 U. S. 365.

C. B. & Q. R. vs. Chicago, 166 U. S. 228.

The final objection to the jurisdiction of this court made by the defendant in error is based on an allegation that no citation had been served upon the defendant in error.

There is no basis for this contention as an inspection of the printed record, pp. 410-2, will show, and the objection is untenable for the following reasons:

1. On March 26, 1907, the Sheriff of Pacific County personally served the defendant in error with a notice signed and issued by the Chief Justice of the Supreme Court of Washington which, omitting the venue and title was as follows:

"A petition for a writ of error having been granted to the Supreme Court of the Unted States, the said writ of error being returnable on the twelfth day of May, A. D. 1907, from a judgment rendered in the Superior Court of the State of Washington, in and for the County of Pacific on the Sixteenth day of January, A. D. 1906, in obedience to the mandate of the said Supreme Court of the State of Washington, issued on the sixth day of December, A. D. 1905, in favor of the appellant, Nicomen Boom Company, and against the respondent, North Shore Boom and Driving Company, reversing the former judgment and decree of the said Superior Court of the State of Washington, in and for the said County of Pacific, and directing a judgment and decree in favor of the appellant Nicomen Boom Company in accordance

with the prayer of its complaint and the said respondent, North Shore Boom and Driving Company, having executed and filed its supersedeas bond in the sum of twenty thousand dollars and the same having been by me approved,

Therefore, the appellant, Nicomen Boom Company and all others are commanded to stay proceedings on said judgment and decree.

Witness my hand this 20th day of March, A. D. 1907.

(Seal of the Supreme Court, State of Washington)

Hiram E. Hadley,
Chief Justice of the Supreme Court of the
State of Washington."

Every material fact of which the defendant in error would be apprised by the service upon it of a common law form of citation, is set forth in the above notice, no matter by what name it may be called. And the notice was emphasized by the command to stay all proceedings contained therein.

In Dodge vs. Knowles, 114, U. S. 430, the citation wasnot served but the appelle was served with an order directing him to appear and argue the case and this court held a citation unnecessary.

2. The object of a citation is notice and where sufficient notice has been given by a stipulation and motion it is unnecessary.

United States vs. Gomez, 1 Wall. 690.
Goodwin vs. Fox, 120 U. S. 775.

As long ago as July 25, 1907, the parties to this writ, by their several attorneys, entered into a stipulation in writing, filed in this court, providing for the printing of the record. (Printed record pp. 411-2).

The plaintiff in error has furnished a printed record in this case at an expense of over $1500. In entering into the stipulation the defendant in error reserved the right to object to the jurisdiction of this Court and it had in mind, apparently, at that time, the making of this motion. This stipulation saved to it the trouble and expense of printing a record upon which to base its motion.

3. A citation was actually issued, although it does not appear to be accompanied by proof of service. (Printed record, p. 411).

This Court has repeatedly held that if a citation was actually issued but not served before the first day of the term to which it was returnable, leave might be granted to make the service during the term.

Dayton vs. Lash, 94 U. S. 112.
Richards vs. Mackall, 113 U. S. 539.
Peugh vs. Davis, 110 U. S. 227.

The contention that this court is without jurisdiction is not sustained by the authorities and the plaintiff in error is clearly entitled to have the merits of this case considered and decided.

ARGUMENT ON THE MERITS.

PROPOSITION I.

Since the Passage of the Acts of Congress of 1890 and 1899, Authority Over the Navigable Waters of the United States Has Been Wholly in the Hands of the Federal Government and Control by the Several States in the Premises Has Been Limited to the Exercising of the Police Power.

Paramount control and authority over the navigable waters of the United States was always vested in Congress, but the legislation necessary to the active control, to the exclusive jurisdiction, had not been enacted, and the Federal control lay dormant. Congress having failed to act, the several states, in various instances, and sometimes under delegated power assumed jurisdiction. These acts of control by the states were never regarded as more than concurrent, outside of the exercise of the police power and were regarded by the courts as simply permissive, and usually affirmed upon the ground, as many of the cases put it, that the state would do less harm than good, and until Congress assumed active jurisdiction no limitation was to be put upon any of the reasonable acts of the state by the courts. Tersely put, the authority of the states over such navigable waters was by sufferance. When Congress passed the act of 1890, which was supplemented by the act of 1899, it assumed sole jurisdiction

over these navigable waters and the states are now excluded from any participation in the control of the navigable waters, whether lying wholly within one state or otherwise, and the state is limited to the exercise of its police power. Hence, whatever rights the defendant in error has to the exclusion of its adversary, so far as the state of Washington is concerned, they must be deraigned through the police power of the state.

While an accurate definition of the police power seems impossible, broadly speaking, it means the general power of a government to preserve and promote the public welfare by prohibiting all things hurtful to the comfort, safety and welfare of society, and establishing such rules and regulations for the conduct of all persons and the use and management of all property as may be conducive to the public interest.

Munn vs. Illinois, 94 U. S. 69.
L. S. & M. S. R. Co. vs. Smith, 173 U. S. 684.

The police power is inherent in the several states and is left with them under the Federal system of government, and may always be exercised by the state legislatûres.

Munn vs. Illinois, 94, U. S. 69.
Ex parte Yarborough 110 U. S. 651.
In re Rahrer, 140 U. S. 545.

A boom company is a company formed for the purpose of improving streams for the floating of logs, by means of booms and other contrivances, and for the purpose of running, driving, booming, sorting and rafting, logs, timber and lumber.

Watts vs Tittabawassee Boom Co., 52 Mich. 206.

Anderson vs. Thunder Bay River Boom Co., 61 Mich. 489.

A boom is an enclosure formed upon the surface of a stream or other body of water, by means of spars, for the purpose of collecting or storing logs or timber.

Clark vs. C. N. N. Lumber Co., 34 Minn. 289.

Boom companies are intended to supply facilities for the driving of logs to the general public and are organized for the purpose of conducting on a large scale, and under one management the business of driving and rafting logs for all who apply.

Osborne vs. Knife Falls B. C., 32 Minn. 412.
West B. B. Co. vs. Pa. J. L. Co., 121 Pa. St. 158.
Duluth L. Co. vs. St. L. Boom Co., 17 Fed. 419.
Cohn vs Wausau Boom Co., 47 Wis. 314.

Boom companies being quasi public corporations the legislature may require them to charge reasonable tolls, to keep certain records for public inspection, make them liable for the loss of timber productions in certain cases, give them the right of eminent domain as to shore lands, and prescribe such regulations, in the interest of the public, as the nature of the business may require. It may empower boom companies to improve streams and to overflow lands upon giving compensation.

Lawler vs Baring B. Co., 56 Me. 445.
Benjamin vs Manistee R. I. Co., 42 Mich. 628.
Wis. R. I. Co. vs Manson, 43 Wis. 255.
Duluth L. Co. vs St. L. B. Co., 17 Fed. 419.
Grand Rapids B. Co. vs Jarvis, 30 Mich., 308.

The states have been held to possess the power to grant the exclusive right to maintain booms or driving logs in any stream, but this was only because of absence of Congressional action.

Osborne vs Knife Falls B. C., 32 Minn. 412.
Cohn vs Wausau B. Co., 47 Wis. 314.
Duluth L. Co. vs St. L. B. Co., 17 Fed. 419.
South Bay B. Co. vs Jewett, 10 N. B. 267.

The booming of logs is a species of navigation and the rights of boom companies to the reasonable use of navigable streams for the purpose of running, driving, booming and rafting of logs, is the same as that of vessels, so long as they do not needlessly obstruct the stream or injure its navigable capacity.

Erie vs Canfield, 27 Mich. 479.
Hayward vs Knapp, 23 Minn. 433.
People vs Horton, 64 N. Y. 610.
U. S. vs Marthinson, 58 Fed. 765.
U. S. vs Burns, 54 Fed. 351.
Cohn vs Wausau Boom Co., 47 Wis. 314.
J. S. Keater L. Co. vs St. Croix B. C., 72 Wis. 62.

A properly constructed boom is not necessarily a public nuisance because it interferes with the operations of another boom on the same stream.

Atty. Gen. vs Everett B.Co., 34 Mich. 462.
Leigh vs Holt, 5 Biss. 338.

But,the police power is simply for the purpose of regulation under proper circumstances and does not extend to authorize the state to regulate on matters which are, under the Federal system of

government, within the exclusive jurisdiction of the Federal Congress.

Hendrickson vs New York, 92 U. S., 259.
N. O. Gas Co. vs Louisiana L. Co., 115 U. S. 650.
Morgan S. Co. vs La. B. of H., 118 U. S. 462.
W. U. Tel. Co. vs New York, 38 Fed. 552.

The agencies of the Federal government are exempt from state control by police regulation, so far as that regulation may interfere with or impair their efficiency in performing the functions by which they are designed to serve the government.

W. U. Tel. Co. vs New York, 38 Fed. 552.

In the casea t bar there is no pretense that the plaintiff in error has violated any of the police regulations of the state of Washington, and the state is not here seeking to enforce any such regulation. In legal effect this is simply an action between two private corporations to try the title to certain territory comprised within the banks of a navigable river which ebbs and flows with the tide. As we have seen, as to who shall use a navigable stream for the purpose of navigation, under the acts of Congress of 1890 and 1899, is vested solely in the Secretary of War and the authority of that official is the only question in this case. The right of the Secretary of War to say that the plaintiff in error may occupy a portion of North River with its boom is supreme and absolute and the state has no concern with the matter except to regulate the business of the plaintiff in error in case it engages therein after procuring the assent of the Federal government. The state may make any reasonable

regulation as to the conduct of that business if the plaintiff in error proceeds to engage therein. Probably, it may prescribe the size of piling, spars and boom sticks, that they shall be of hemlock or fir, what reasonable tolls may be charged, what records shall be kept, that the products of non-contracting owners shall be passed through the boom without delay, and otherwise reasonably regulate the business, but beyond this the state cannot go. Any attempt of the state, since 1890, to say who shall and who shall not navigate North River, is entirely without jurisdiction, void and an assumption of authority which the state does not possess. This is the controversy in a nutshell.

PROPOSITION II.

The Granting of the License by the Secretary of War to the Plaintiff in Error to Construct its Boom in North River Was a Revocation of So Much of the License Granted to the Defendant in Error as Related to the Territory Located by the Former.

The Secretary of War granted permision to the defendant in error to construct its boom in North River, co-extensive with its original plat. Only a portion of this territory was actually appropriated with boom works under this permit. More than three years later, a large portion of this territory being vacant and unoccupied, the Secretary of War granted a similar permit to the plaintiff in er-

ror to ocupy a portion of such unoccupied and unappropriated territory with its boom.

Conceding that the state had been delegated authority by Congress to exercise its authority over all navigable public rivers, the right to occupy and use the same is dependent upon the concurrent consent of the state and the United States and the control of the general government being in the interest of unobstructed navigation, the consent of the latter must remain revocable, as circumstances may require, and is in the nature of a license.

Cummings vs Chicago, 188 U. S. 410.
Montgomery vs Portland, 190 U. S. 89.

In the case at bar only a portion of its located territory had been reduced to possession by the defendant in error by actual appropriation. It had constructed its boom, was carrying on its business and gave no indication, until a rival appeared, that it did not have all the territory it intended to take. When the plaintiff in error presented its application for permission to erect its boom, it must be presumed that the Secretary of War had fully investigated the situation, knew all of the facts and that when he granted the second permit, every natural consequence of such act was intended. Both parties could not occupy the same territory with a boom at the same time. The one necessarily excluded the other and the later locator upon receiving the grant promptly took possession by constructing its boom before any attempted user by the other. The defendant in error could have terminated its right in North River by going out of business, the Secretary of War might revoke permission at any time, and the mere granting of a permit could not

be the foundation for vested rights. The right was simply a personal privilege, terminable at the will of either party, a mere license.

But a license may be revoked at any time by the licensor, by the doing of an act evidencing an intention to revoke it.

Nichols vs Peck, 70 Conn. 439.
Wilson vs St. Paul R. R. Co., 41 Minn. 56.
Johnson vs Skillman, 29 Minn. 95.
Hazleton vs Putnam, 3 Pin. 107.
Dunham vs Joice, 129 Mo. 5.
Fischer vs Johnson, 106 Iowa 181.

A license founded on a valuable consideration to take water from a spring is revoked by a deed from the owner granting to another the right to draw an amount of water that will exhaust the supply.

Ekerson vs Krippen, 110 N. Y. 585.

The Secretary of War may have concluded that the defendant in error had abandoned the unused territory by neglecting to avail itself of the prior license, or, that to refuse to grant the second license would create a monopoly in the busines of booming logs on North River or that two boom companies in oposition to each other would create a healthy competition and be more apt to keep the river open in thus, impliedly at least, revoking the first license. If its license, as to the territory in dispute, had been revoked, then the defendant in eror would not have the consent of the Federal government to occupy the disputed teritory at the time this action was brought. In the absence of such consent, its title failed and it cannot maintain ejectment or what is its equivalent, the writ of mandatory injunction. It must recover upon the strength of its own title

and not upon the weaknes of the title of its adversary.

In the ordinary action by injunction to restrain trespass, waste or kindred injuries to real property the plaintiff must allege and prove title in himself or he cannot have a decree. A mere equitable interest will not support the action.

Youn vs Porter, 3 Woods C. C. 342.
Fussell vs Hughes, 113 U. S. 565.

The defendant in error as against the plaintiff in error, had no right to the possession of the disputed territory unless it was authorized to use the same for some of the purposes mentioned in the act of Congress. The permission of the Secretary of War under which there had never been an appropriation or user, having ben revoked, it had no standing in court.

PROPOSITION III.

The Permit Granted to the Defendant in Error to Erect a Boom Structure in the Navigable Waters of North River Was Limited to its Acceptance Under the Same.

The permit granted to the defendant in error by the Secretary of War was limited to the erection of a certain structure in the navigable waters of North River, according to a defined plan submitted with the application. Under this authority it constructed and completed a boom and engaged in the business of catching, booming, sorting and rafting logs.

But, in the erection of its boom structure, it made no use of the upper one mile or thereabouts, of its located territory, leaving the same vacant.

While the defendant in error was authorized to occupy its entire located territory, it acepted the privilege granted by the Secretary of War only to the extent to which it made actual appropriation of such territory by the erection of its boom structure. The permission went to the structure itself. The defendant in error acted thereon, made its selection and was bound by its acceptance of only a portion of the located territory. To complete a grant of, even an incorporeal hereditament, there must be an acceptance. Ordinarily, the law will presume an acceptance of the entire grant, but where the conduct of the parties clearly shows the contrary in whole or in part, this presumption will not obtain. Besides, by the erection of its boom structure, completing the same and engaging in its business, its authority over its license was exhausted, as appears by analogy from the following cases:

A power to make a goit or sluice and keep it in repair is exhausted by making one goit or sluice.

Bostock vs Sidebottom, 18 Q. B. 813.

Where a license to put in "water mains" is given but only one main is completed, only that one can be laid.

Great Falls W. W. Co. vs G. N. R., 21 Mont. 487.

A license to erect a structure does not carry with it the right to rebuild as, on the erection of the building, the act has been done and the license is at an end.

Clark vs Glidden, 60 Vt. 702.

A license to build a dam does not carry a license to rebuild it if destroyed.

Washburne on Real Property, 299.
Cowles vs Kidder, 24 N. H. 364.
Carleton vs Ridington, 21 N. H. 293.
Wingard vs Tift, 24 Ga. 179.

A parol license to build a bridge does not confer a right to rebuild.

Hall vs Boyd, 14 Ga. 1.

Where, under a license to build a road across a bay, a road had been constructed on piles, the license is exhausted, and an embankment cannot be substituted thereafter for the piles, even though it might have been made in the first instance.

Southampton vs Jessup, 10 N. Y. App. Div. 456.

PROPOSITION IV.

The Plaintiff in Error, With the Assent of the Secretary of War, Occupied Only a Portion of the River Reserved for Purposes of Navigation Under the Location of Defendant in Error and Only the Federal Government Could Complain.

The defendant in error, in compliance with the state boom statutes, located its boom along the left bank of the river, acquiring the shore and tide lands and leaving the channel for navigation along the right bank. The plaintiff in error acquired the title to the shore and tide lands on the right bank of the river and with the per-

mission of the Secretary of War, located and constructed its boom along that bank, more than 1300 feet above the boom of the defendant in error and in that portion of the river reserved under the latter's location for the purposes of channel and navigation. While the complaint charges the plaintiff in error with having entered upon the tide and shore lands of the defendant in error, the court below found the facts to be as above stated. (Findings 2 and 8, record, pp. 310 and 313.

There is no allegation in the pleadings that the plaintiff in error was maintaining a nuisance or violating any of the police regulations of the state. The contest was confined to the abstract question of priority of right to that portion of North River occupied by the boom structure of the plaintiff in error. The Federal laws require that all navigable rivers shall be kept free from obstructions to navigation. The laws of the state of Washington recognize navigable streams as public highways and their policy is to preserve them as such. In creating boom companies it is well understood that no exclusive use of the highway is granted and that the ordinary navigability of streams is not to be interfered with.

The defendant in error had by choice located its territory along the left bank of the river with which to occupy its boom. It lay no claim to the right bank because it was necessary under the state boom statutes that, that side of the river should be reserved for purposes of navigation. How the right bank, or channel portion, of the river was occupied or used did not concern the defendant in error. It was only incumbent upon itself to avoid all personal culpability in obstructing navigation. The of-

fense of some other person in the premises was none of its affair. The United States and the state were the guardians of navigation and if the plaintiff in error went upon the channel of North River and obstructed it, it was no more concerned than any other member of the public and it has no standing in this action. Aside from obstructing general navigation the two booms could be operated side by side and nothing in the pleadings shows any special damages. Nothing in the conduct of the plaintiff in error prevented the defendant in error from extending its boom if it had that right, as the plaintiff in error did not construct its boom outside of the territory located by it. Only the two governments could complain of this. And nothing could better illustrate how erroneous was the view of the Supreme Court of Washington than an inspection of the judgment of January 16, 1906, made by the Superior Court, under the former's direction, which shows that instead of awarding the defendant in error the territory located by it and reserving a channel, the possession of the entire river from shore to shore is awarded to it.

PROPOSITION V.

The Legal Effect of Filing a Plat Under the Boom Statutes of Washington Does Not, in Itself, Confer Any Exclusive Right to Occupy Navigable Waters but Amounts Simply to Notice of an Intended Appropriation.

It was contended by thedefendant in error in the court below, that by the mere filing of its plat under

Secs. 4379 and 4389 of Ballinger's Code, it acquired the exclusive right to occupy the entire area within its plat limits for boom purposes, and that this exclusive right would be forfeited only by failure to occupy and use the premises for the period of ten years and that, in any event, only the state could complain of the non-user. This contention was, practically, adopted by the Supreme Court of Washington in rendering its decision.

The boom statutes do not limit the area which may be included within the plat; and if the first boom company platting navigable water area, thereby acquires not only the first right but the exclusive right, the result is a monopoly.

It is fair to presume that the legislature in enacting the several boom statutes, intended thereby to encourage the improvement of rivers and navigable waters for the purpose of advancing the logging industry. To prevent competition in booming would have a stifling effect upon that industry and might even be prohibitive in its effect. Hence, the presumption arises that the legislature intended that a boom company should only appropriate what would be reasonable and sufficient to carry on its business.

Again, Sec. 4388 confers the right to acquire property by the exercising of the right of eminent domain, limiting the same to what "shall be necessary for carrying on the business of a corporation." Only property reasonably necessary for corporate purposes could be condemned under this statute from which it is apparent that the legislature intended to make it certain that a boom company could not condemn property and then fail to use it.

S. R. Boom Co. vs Union Boom Co. 32 Wash. 586.

Sec. 4378 provides as follows:

"That any property acquired under the provisions of this chapter by the exercising of the right of eminent domain shall be used exclusively for the purpose of this chapter and whenever the use of said property as therein contemplated, shall cease, for a period of one year, the same shall revert to the original owner his heirs or assigns, upon the repayment of the original cost of the same."

The supplemental boom act of 1895 contained a similar limitation but omitted the repayment of the costs of condemnation in order to secure the reversion.

Sec. 4388 Ballinger's Code.

It thus appears that in two separate acts, each in force, the legislature has provided that property condemned for boom purposes by the exercise of the right of eminent domain, if not used for one year for boom purposes, shall revert to the original owner. The purpose of these statutes is evidently that non-user for one year shall work a forfeiture of boom rights. If condemned property thus reverts for mere non-user, the reason would be much stronger that property not condemned and in respect of which merely a plat had been filed, should be held to work a waiver in favor of the public.

The policy of these statutes then is that the boom company is limited to the appropriation of territory to its necessities.

Secs. 4379 and 4389, Ballinger's Code, provide for the filing of a plat "of so much of the shore lines of the waters of the state and of the lands contiguous thereto, as are **proposed to be appropriated** for said purposes by said corporation."

The use of the words "proposed to be appropriated" makes it clear that the filing of the plat was simply for the purpose of giving notice to the world of the intention of the company. It was the initial step in the acquisition of such rights as such a corporation may acquire under these statutes. It was such notice as the legislature deemed necessary for the protection of the public and private individuals, interested in contiguous lands as well. Followed by appropriation and user the rights of the locator might culminate even in vested rights.

Under the irrigation statutes of some of the states, where it is sought to appropriate water, the filing of notices and of plats or maps, is required. The posting of notices and the recording of plats are held to be not conditions precedent to a valid appropriation of water but, simply, for the purpose of apprising other persons contemplating the diversion of water from the same stream that the appropriator has taken the first steps towards securing his rights and to preserve evidence thereof.

XVII Ency. of Law, 498.
Wells vs Mantes, 99 Cal. 583.
Walden vs Saldenbeher, 101 Cal. 107.
Senior vs Anderson, 115 Cal. 496.
Murray vs Tingley, 20 Mont. 260.

In this case the intention to appropriate never culminated in an overt act. The area in dispute remained open to the world and unoccupied for more than three years after the Nicomen plat was filed.

The basis of the decision of the court below in reversing the trial court is that the filing of the plat constituted an appropriation. Confounding the intention to appropriate, the notice of appropriation

with the act of appropriation itself, it is argued that a property right was acquired, which could be divested only by the exercising of the right of eminent domain, or by **quo warranto** or by non-user for the original statutory period of ten years. The position seems to be that the first boom company upon the river can, whether necessity exists therefor or not, by filing a plat covering the entire boom area of the river and by actually occupying a fraction of its platted area, prevent other boom companies from thereafter occupying the unused platted area. This is the assertion of an exclusive right.

"An exclusive right to enjoy a certain franchise is never presumed and unless the charter contains words of exclusion it is **impairment** of the grant to permit another to do the same thing, although the value of the franchise of the first grantee may be wholly destroyed."

Charles River vs Warrenburg, 11 Pet. 20.
Washington vs Maryland, 3 Wall. 310.
Pearsall vs Great Northern, 161 U. S. 664.

"No law shall be passed granting to any citizen, class of citizens or corporation, other than municipal, privileges or immuniies which, upon the same terms, shall not equally belong to all citizens or corporations."

State Constitution, Article I., Sec. XII.

"Monopolies and trusts shall never be allowed in this state."

Ibid, Article XII., Sec. 22.

Wood vs Seattle, 23 Wash. 20.

Neither boom statute reports to grant an ex-

clusive right to first boom companies upon any river. On the contrary, each recognizes that there can be more than one boom company operating a river by providing for the passage of logs from upper booms through those below.

Sec. 4382, Ballinger's Code.

"It is a rule applicable to all public grants in derogation of public rights that the same shall be strictly construed in favor of the public and against the grantee."

Charles River Bridge vs Warren, 11 Pet. 422.

"Where rights are claimed against the state, they must be so clearly defined that there can be no question of the state to confer them."

Leavenworth vs United States, 92 U. S. 733.
Barden vs N. P. R. Co., 154, U. S. 325.

It is not claimed that the boom statutes are ambiguous and that it is necessary to place a construction upon them for that reason. Attention is called to the rule that exclusive rights are never presumed to be granted, that every intendment which can reasonably be made, is against the party claiming exclusive rights and the constitutional prohibition against exclusive grants, to show that the mere filing of a plat, by which everything in sight could be claimed would not operate, standing alone and not followed by appropriation and possession, to confer exclusive rights to the territory thus located.

In the case of North Springs Water Co. vs Tacoma, 21 Wash. 517, the court says:

"The familiar rule that a privilege creating a monopoly cannot be given without the grant from the sovereign, the legislature, has been extended in

this state, and that power taken from the legislature by the Constitution; and Sec. VIII. of Article I. of the Constitution **supra**, is also pertinent in considering the general policy of the state."

The same court, speaking in State **ex rel** Spokane Telephone Co. vs City of Spokane, 24 Wash. 53, recognizing that exclusive franchises cannot be granted, says:

The argument against the power to grant an exclusive privilege is sound and is fully sustained in the rule announced by this court in North Springs Water Co. vs Tacoma, **supra,** but the question of the power to grant an exclusive privilege cannot arise here. If the city had attempted to grant such privileges to a telephone company so as to disable itself from consenting to the construction of another telephone system through its streets, such attempt would be void and beyond its power."

The only reasonable interpretation of these statutes is that the filing of a plat by a boom company is only effective as to such area as is necessary for its use and that it cannot obtain exclusive right by platting except as to such territory as is immediately followed by appropriation and possession. It cannot prevent competition by, at the same time, so extending its platted area as to include all other available boom sites.

Any other construction placed on the statutes runs counter to the Constitution; opposes the established public policy of the state and permits the self interest of the first corporation to determine whether it shall have competition in booming or not, besides, limiting the condemnation of property for boom purposes to what is necessary in the present and providing for the reversion of condemned property

upon non-user for one year is inconsistent with the position that the filing of a plat is anything more than mere notice of intention to appropriate.

PROPOSITION VI.

There is No Analogy Between the Filing of a Plat by Boom Company Under the Washington Statutes and the Filing of a Map by a Railway Company in Selection of its Route.

The court below, in sustaining the contention of the defendant in error, held that a boom company, being a public service corporation, has a preference right to construct a boom within its located territory, in analogy to the rights of a railway company, conferred by its selection of a route and that it has the right to anticipate the future needs of service for the public.

> Nicomen Boom Company vs N. S. Boom Company, 40 Wash. 315.

There is no analogy between boom companies and common carriers. A railway company engages in no business not open to all. A private individual may equip and own a railway. A charter confers upon the carrier corporation "powers" only. The right of way terminals, depot grounds, etc., of a railway corporation, are usually acquired by grant, modernly, absolute and in no case subject to be defeated or lessened except by abandonment, non-user and in rare instances, by a greater public necessity. Its property rights are corporeal.

The right to maintain a public boom on the waters of the state is not extended to individuals. Only boom companies can exercise that right and it is not open to all.

Healy Lumber Co. vs Norris, 33 Wash. 490.

The privilege conferred upon a boom company is a "franchise" as there can be no ownership, **in the corpus** of water, (Rigney vs Tacoma Light etc. Co., 9 Wash. 576.)

The boom company acquired only a license, a mere incorporeal right, a simple usufruct.

Atchison vs Peterson, 20 Wall. 507.

This incorporeal right is not acquired by grant but by appropriation and it is doubtful whether it can be alienated. In Samish River Boom Co. vs Union Boom Company, 32 Wash. 598, it was said that "boom companies are organizations of a peculiar character. Their operations are necessarily restricted to the waters of the state and in some cases, to a particular river."

The booming of logs is a species of navigation and the only essential of the boom area is floatability. The enclosure is a sort of anchorage and is only for the purpose of holding the floating logs for the purpose of sorting and rafting. The water sustaining the log for one instant is gone the next. The statute permits the boom company to charge tolls but these tolls are not permitted to be charged for the use of the river, but to compensate boom owners for their outlay, in erecting and maintaining works to facilitate the common use of the stream and to care for the logs coming within their limits. The boom acts do not, in effect, tend to change the character of the river as a common highway, nor to prevent any per-

son, who desires, from floating and booming logs upon it. The statutes do not assume to declare that any person shall not use the river, or be excluded from such common highway. The state does not attempt to barter the river away, but the most that can be said is that the regulation of driving logs, or more aptly and to the point,the regulation of the navigation of the river is sought. It is submitted that we must seek elsewhere for a proper analogy.

The incorporeal or usufruct in water may be acquired for mining, mechanical, agricultural or other useful purposes. Contrary to the common law, in the Pacific States at least, this right is acquired by appropriation and in a manner of procedure corresponding to that provided by these boom statutes. It is a mere possessory right, passes through no stages as the ripening of an inchoate title and is easily lost as by non-user, abandonment and other similar instances. The possession of a mining claim gives only a possessory right to the soil, but this may ripen into a fee simple title by a compliance with the mining statutes. The accompanying water rights are mere incidents easily lost. Title to water may aptly be said to be title by "eternal vigilance" because of its very nature. The various steps required to appropriate water for beneficial purposes are similar to those required in the case of boom companies desiring to take "the waters of the state," as the filing of notice of the quantity claimed, the purpose, and under the irrigation statutes of some of the states, plats or maps must be filed and the procedure, generally, is analogous. The term "appropriation" as applied to water has a clear, distinct and well known meaning.

As we have seen, supra, the recording of plats is not a condition precedent to a valid appropriation of water, but is simply notice.

The essential elements entering into a valid appropriation of water are:

1, an intent to apply it to some beneficial use; 2, a diversion of the water, and 3, an application of it within a reasonable time.

Low vs Rizor, 25 Ore. 551.
Nev. Ditch Co. vs Bennett, 30 Ore. 59.
McDonald vs Bear R. Co., 13 Cal. 220.
Thomas vs Gerind, 6 Cal. 530.
Offield vs Ish, 21 Wash. 280.

One who conceives the purpose of applying water to some beneficial use **must act with diligence.**

Nevada Co. vs Kidd, 37 Cal. 316.

In Ophir etc. Co. vs Carpenter, 4 Nev. 534, the court says:

"Diligence is defined to be the steady application to business of any kind; constant effort to accomplish an undertaking. The law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary and reasonable. It is the doing of an act or series of acts with all practical expedition, with no delay except such as may be incident to the work itself. The law then requires the grantors of the defendants to prosecute the work necessary to an execution of the design with all practical expedition."

The rule in Colorado is thus stated in Farmers etc. Co. vs Southworth 13, Col. 111:

"There must be not only a diversion of the waters from the natural stream, but an actual application of it to the soil to constitute the constitutional appropriation recognized for irrigation."

In the case at bar, the defendant in error filed its plat and survey on April 5, 1903. This was notice of the territory it intended to appropriate and use. Upon filing this plat, it, immediately and diligently, proceeded to make an appropriation by enclosure and use, but the area reduced to such possession and use and, therefore, actually appropriated, was not more than one-fourth of the territory located by the maps and survey. It completed its boom as **then contemplated,** put in its rudder sheer, stopped further work of construction and entered upon its business of booming logs. No act of further appropriation was attempted by defendant in error for more than three years, thereafter and only after plaintiff in error had filed its survey and plat. Whatever may have been the rights of the defendant in error during this period of three years, by reason of its failure to act, the plaintiff in error became the prior appropriator of the territory in dispute.

In Ophir etc. Co. vs Carpenter, **supra,** it appeared that a person desiring to convey water from a river to a village, gave notice of the appropriation of all its waters, in 1858 constructed a ditch more than four miles in length and of varying depth and width and in the year following used it for the purpose of conveying water to such village and other purposes. Some **three years later** he enlarged the ditch so as to increase its capacity ten-fold. In the meantime other persons had entered upon an enterprise, looking to

the diversion of water from the same stream, and the first appropriator claimed that he had a prior right to all the water carried by his enlarged ditch on the ground that **he had at all times intended** such enlargement and had proceeded with reasonable diligence to carry out his plans. It was shown, however that the work prosecuted by him during the three years succeeding 1858, consisted chiefly in clearing out the existing ditch. It was held that the persons who, during the **period of inactivity** of the first appropriator, entered upon the work of a second appropriation and prosecuted it vigorously and diligently, acquired rights against which the subsequent enlargement of the ditch of the first appropriator could not prevail.

And under the title, "Right to Appropriate Water Generally," Sec. 493, Ballinger's Code of Washington, in defining the duties of the appropriator, the statute recites; "it being herein expressly provided that such works must be diligently and continuously prosecuted to completion, unless temporarily interrupted by the elements."

"An appropriation cannot be constructive because there would be no rule to limit or control it, resting, as it must, only in intention."

Kelley vs Natouna, 6 Cal. 108.

"A land owner who has appropriated water for use upon his land is restricted to such use and cannot after the amount has become fixed by the use, increase it to the detriment of subsequent intervening appropriators, either by purchase and placing under cultivation an additional amount of land, or by selling the surplus to be used by others."

Senior vs Anderson, 115 Cal. 496.
Union etc. Co. vs Dangfield, 81 Fed. 73.
Becker vs Marble, C. I. Co., 15 Utah, 225.

And there are many cases which hold that so much of the water as the appropriator has not applied must be regarded as having never made any valid appropriation for.

McKinney vs Smith, 21 Cal. 384.
Senior vs Anderson, 115 Cal. 496.
New Mercer D. Co. vs Armstrong, 21 Col. 357.
Columbia Co. vs Holter, 1 Mont. 296.
Alder etc. Co. vs Hays, 6 Mont. 38.
Simmons vs Winters, 21 Ore. 35.
Hindman vs Risor, 21 Ore. 112.
Wheeler vs Irrigation Co., 10 Col. 582.
Butte vs Vaughn, 11 Col. 154.

All of the cases cited in the brief of the defendant in error and referred to by the court below in making its decision as to the effect of the filing of the map and survey, are railway cases and related to a different species of property rights and an entirely different method of acquiring the same.

As has been said, the ownership of the corpus of water cannot be acquired in appropriating waters of the state, the title is not divested and only the usufruct passes.

In the case of the railroad the location of the line is the initial step in a proceeding to acquire the right of way; the location itself confers no title but by following it with the further acts required by the statute, it may ripen into a title absolute to all intents and purposes.

In the case at bar the defendant in error had a

mere license to go upon the waters of the state and the filing of its plat was simply notice of its then intention, of the waters it intended to appropriate, as is stated in the boom statutes. It simply failed to do all it gave notice of its intention to do.

The court below held that the defendant in error in appropriating the waters of the state might take into consideration the future growth of the logging business. If it had such right, that is, to locate territory sufficient not only for present use but for future needs as well, it would not follow such proposed taking by an actual appropriation. It would not reduce the territory required in the future to possession and use. And here the analogy of railroad cases is discarded. While the railroad may condemn land sufficient not only for the present but for future requirements, it must condemn for both purposes and pay for the land taken before it acquires title, although much of it may not be used for years. There can be no non-user of what has never been reduced to a use; nor can one forfeit and abandon a thing never in possession. So long as the water in question was unappropriated, a part of the public domain, as it were, it was open to appropriation to any one who could secure the permission of the Secretary of War, and such appropriation would not violate the police regulations of the state. The defendant in error slept upon its rights and opportunities and the plaintiff in error became the prior appropriator.

PROPOSITION VII.

The Boom of the Plaintiff in Error Was Not an Unlawful Structure.

The court below held that the North Shore Boom and Driving Company's boom was an unlawful structure. The plaintiff in error has been in possession of the disputed territory and operated its boom for more than five years. The United States government has never complained. This is not an action to abate a public nuisance but is simply one for the trial of the right of two private corporations to the possession of a portion of North River. It is not claimed that the North Shore boom interferes with the navigation of North River, nor that the respondent has acted in defiance of the U. S. authorities. In three cases, U. S. vs R. G. Irrigation Co., 174 U. S. 690, Cummings vs Chicago, 188 U. S. 410 and Montgomery vs Portland, 190 U. S. 89, the moving party was the sovereign, itself, and the question involved in each case related solely to the exercising of its police powers by the state.

If an United States statute has been violated or the Federal assent has not been, in fact, given, and is only colorable, only the Federal Government can complain.

Manuel vs Wulff, 152 U. S. 505.
McKinley C. M. Co. vs A. U. M. Co., 183 U. S. 563.

The latter case is especially in point. The mining

statutes of the United States require that the locator of a mining claim shall be a citizen of the United States, or have declared his intention to become such. There was no evidence that the locators of the mining claim in question were citizens of the United States, and it was claimed, therefore, that the location was not valid just as it is claimed in this case that the permission of the Secretary of War has been only colorably given.

Upon this contention, in the case referred to, this court has said:

"The appellants, however, deny the application of Manuel vs Wulff, **supra**, and contend that this suit having been brought under Section 500 of the Oregon Code, in order to maintain the suit, the appellees must show a right to the exclusive possession of the ground in dispute. This is in effect to say that while the validity of the location may not be disputed by appellants, that the right to possession, which is but an incident to the location, may be. We do not concur in this view. The meaning of Manuel vs Wulff is that the location by an alien and all of the rights following from such location, are voidable, not void, and are free from attack by anyone excepting the government."

Tersely put, this case was decided in favor of the defendant in error by the Supreme Court of the State of Washington upon the sole ground that the filing of its plat and survey by the defendant in error, constituted the location and appropriation of all the territory described in the plat and the decision is based wholly and solely upon that one fact. Upon any view of the merits of the case, whether as a Federal ques-

tion alone, or, as a general legal proposition, this decision was palpably wrong and it is confidently submitted that the decision of the Supreme Court should be reversed and the judgment originally rendered by the Superior Court of the County of Pacific should be affirmed and the bill dismissed.

W. H. ABEL,
CHAS. E. MILLER,
JAMES B. HOWE,
SAMUEL H. PILES,
Attorneys for Plaintiff in Error.

JOHN M. THURSTON,
Of Counsel.

NO. 20762

IN

The Supreme Court

of the United States

OCTOBER TERM A. D. 1907
NO. 359

NORTH SHORE BOOM & DRIVING COMPANY,
Plaintiff in Error,
v.
NICOMEN BOOM COMPANY,
Defendant in Error.

Brief of Plaintiff in Error Against Motion to Dismiss Writ of Error.

STATEMENT

This controversy had its origin in the Superior Court of the State of Washington, in and for the County of Pacific, its object being injunctional relief against the plaintiff in error, defendant below, in the occupancy of a certain portion of the navigable tide waters of North River, an arm of the Pacific Ocean, for boom and log driving purposes.

The trial court denied the relief prayed for and an appeal was taken. On hearing, *de novo*, in the

Supreme Court of the State of Washington, this decree and judgment was reversed and the cause remanded with instructions to make conclusions of law and to enter judgment as prayed for in the complaint.

Thereupon the trial court restated its conclusions of law and made and entered its decree, adjudging the plaintiff, defendant in error, here, entitled to the possession of the entire river from its mouth and for a considerable distance up-stream, and excluded the defendant, plaintiff in error, here, therefrom, without exception.

On the next day, January 17, 1906, on application of plaintiff in error, Chief Justice Mount, of the Washington Supreme Court, allowed a writ of error to this Court, directed to the judgment of the Washington Supreme Court, and a supersedeas conditioned upon an approved bond in the sum of $10,000, which was duly given.

A return was made to this Court, the record was printed and the final hearing was fixed for March 11, 1907. Returnable on the same day was a motion made by defendant in error, asking that said writ be dismissed, on the ground, among others, that the said judgment of the Washington Supreme Court, to which it was directed, was not a final judgment. Counsel on both sides disagreed in their opinions upon this question and as a matter of precaution, large interests being involved, the plaintiff in error, on the day set for said hearing, procured the dismissal of its said first writ of error.

On March 13, 1907, two days later, the plaintiff

in error made application to Chief Justice Hadley, of the Washington Supreme Court, for its second writ of error, but directed to the judgment of the trial court, made and entered on January 16, 1906, in obedience to the mandate of said Supreme Court. The record being in the State Supreme Court, the return to this writ of error was made by that court. Chief Justice Hadley also granted an order of supersedeas, conditioned upon an approved bond of $20,000, which was duly given.

On July 25, 1907, the parties to this action by their respective attorneys, entered into a written stipulation, duly filed in this court, to the effect that, so far as applicable, the printed record filed under the first writ of error, should have added the proceedings subsequent thereto, and that the same should constitute the printed record upon the second writ of error. The printed record was duly filed in this Court in accordance with this stipulation.

The facts developed upon the trial, and upon which the questions of law arise, are these, as appears from the Findings of Fact, made by the trial Court, and found at page 310 of the printed record, to-wit:

That the defendant in error is a corporation of the State of Washington, organized on March 19, 1900, for booming logs and other timber products; that on April 5, following, it filed its plat of location, showing that it proposed to appropriate, practically, all of the shore lines and waters of North River and contiguous lands, available for boom purposes, designating them; that before be-

ginning the construction of its boom, it submitted a plan of its proposed improvements and a plat of the territory to be occupied thereby to the Secretary of War of the United States, and was granted the Federal permission or license to construct the same; that it acquired the tide and shore lands contiguous to its location, along the left bank of the river, reckoning down stream; that it immediately proceeded to erect boom works along the left side of the river as far as it cared to operate at the time, but stopped a mile or more short of the upper end of the territory covered by its plat of location; that the boom works consisted of dolphins driven near the center of the stream, about 40 feet apart, connected with boomsticks to form an enclosure, with a sheer boom a short distance above the upper dolphin, movable and anchored to the shore on the right bank of the river, so constructed as to intercept all logs coming down the river and to shunt them into the boom, and that this boom was never actually constructed beyond this sheer boom.

That more than three years later, to-wit: on August 26, 1903, the plaintiff in error, defendant below, was organized and incorporated under the laws of the State of Washington, both as a boom and a driving company; that on the same date it filed with the Secretary of State, in the manner prescribed by law, its plat and survey of location, showing the water and shore lines and contiguous lands which it proposed to appropriate for boom and driving purposes; that before beginning any work of construction it applied to the secretary of

war for permission to build a boom within the limits of its said plat of location and was duly granted license thereto, in the manner usual in such cases, by that official; that the several plats of location filed by the plaintiff in error, covered, substantially, the portion of the territory within the location of the Nicomen Boom Company lying above the upper end of its sheer boom; that the plaintiff in error, at the time, acquired the tidelands and fast lands within its plat of location along the right bank of the river and on the opposite side from the works of the defendant in error; that shortly after its incorporation, the plaintiff in error began the construction of its boom, within the limits of both plats of location about 1500 feet above the said sheer boom of the defendant in error, driving its first piles on September 4, 1903; that up to that date, no structure of any kind had been erected by defendant in error within the limits of the territory so located and occupied by the plaintiff in error, nor was any part of said territory in the actual possession of, or occupation by the defendant in error; that the construction of the two booms is practically the same; that the plaintiff in error has not erected any improvements or structures on any part of the uplands or tide-lands belonging to defendant in error, nor are these lands rendered less accessible, and the line of dolphins constituting the boom of plaintiff in error are constructed on the opposite side of the river; that the sheer boom and receiving boom of the plaintiff in error are so constructed as to allow free passage between same and the opposite shore for all boats, vessels or steam craft plying on the river

for the ordinary purposes of navigation: **that both booms as constructed can be operated without interfering with Navigation on North River** and that the boom of plaintiff in error is so constructed that it can, without unreasonable delay, pass logs and other timber products consigned to the boom of the defendant in error.

That the trial court, as conclusions of law, found that the defendant in error had not appropriated the territory covered by the plat of the plaintiff in error; that the boom of the plaintiff in error was a lawful structure; and that the area occupied by it was rightfully in its possession.

The several statutes of the State of Washington, relating to and authorizing the construction of booms and the driving of logs, are as follows:

S 7111. Any corporation heretofore or hereafter organized in the State of Washington for the purpose of catching, booming, sorting, rafting, and holding logs, lumber or other timber products, shall have power to acquire, hold, use and transfer all such real and personal property or estate, by lease or purchase, as shall be necessary for carrying on the business of said corporation. If such corporation shall not be able to agree with persons owning land, shore rights, or other property sought to be appropriated, as to the amount of compensation to be paid therefor, the compensation therefor may be assessed and determined and the appropriation made in the manner provided by law for the appropriation of private property by railways: *Provided*, that any property acquired under the provisions of this act by the exercise of the

right of eminent domain shall be used exclusively for the purposes of this act; **and whenever the use of said property as herein contemplated shall cease for a period of one year,** the same shall revert to the original owner, his heirs or assigns, upon the repayment of the original cost of same.

P. C. 7111; B. C. 4378. I. H. C, 1590.

S. 7112. Any corporation hereafter organized for the purpose mentioned in section one of this act shall, within ninety days after its articles of incorporation have been filed, proceed to file in the office of the Secretary of State a plat or survey of so much of the shore lines of the waters of the state and lands contiguous thereto as are proposed to be appropriated for said purpose by said corporation. Any corporation heretofore organized in the Territory of Washington for any of the purposes expressed in section one (1) of this act, shall file such plat within ninety days after the passage of this act. Such plat shall be made from the records of the United States in the Surveyor-General's office of this state, or by a competent surveyor, subsequent to actual survey.

P. C. 7112; B. C. 4379; I. H. C. 1691.

S. 7113. Such corporations shall have power and are hereby authorized, in any of the waters of this state or the dividing waters thereof, to construct, maintain and use all necessary sheer or receiving booms, dolphins, piers, piles or other structure necessary or convenient for carrying on the business of such corporation. *Provided*, That such boom or booms, sheer booms or receiving booms shall be so constructed as to allow the free passage

between any of such booms and the opposite shore for all boats, vessels or steam crafts of any kind whatsoever, or for ordinary purposes of navigation.

P. C. 7113; B. C. 4380; I. H. C. 1592.

The state statutes as to driving companies are found in Pierce's Code of 1905, Sections 7120 to 7127, inclusive. Section 7126 is as follows:

S. 7126. Should any corporation neglect for the period of eight months after improving any stream or river, to operate its dams, or to otherwise perform its duties as herein provided, then all rights herein conferred upon such corporations upon such streams or rivers, or any portion thereof, shall cease.

POINTS, AUTHORITIES AND ARGUMENTS

U. S. STATUTE.

"By the 7th section of the river and harbor act of Congress, approved September 19th, 1890, Chap. 907, it was provided: 'That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any state, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge-draw, bridge piers, and abutments the construction of which has been heretofore duly authorized by law, or to be so construed as to authorize the construction of any bridge, drawbridge,

bridge piers and abutments, or other works, under an act of the legislature of any state, over or in any stream, port, roadstead, haven, or harbor, or other navigable water not wholly within the limits of such state.'" 26 Stat. at L. 426, 454.

Both boom companies were incorporated long after the passage of the Act of Congress of September 19, 1890, and both recognized the authority of Congress by securing permission from the Secretary of War to erect their respective boom structures. If either company had attempted to erect its boom without the Federal assent, it would have been very promptly stopped and ejected from the river by the Secretary of War. Hence, the authority of any person to thus occupy this stream is **wholly a Federal question,** whether the right questioned is under the Federal or State statutes.

This position is made entirely clear by the language employed by Mr. Justice Peckham in the case of United States vs. Bellingham Bay Boom Company, 176 U. S., at page 218, in construing the U. S. Statute of September 19, 1890, and we quote his words in full as to the Federal character of the question involved:

"If there were no Federal law in existence, then the question whether the boom was authorized by a state law, or complied with its provisions, would be a state question, as is clearly set forth in the above extract. But the Federal law having been passed, the question then is whether the structure is permitted by that law, and when that law says it may continue, if affirmatively authorized by a state law,

the question whether it is so authorized becomes in effect a question whether the Federal law does or does not permit it. **If it is authorized by the state law, then the Federal law provides that it may continue; and whether it is or is not, becomes a question for the Federal Court to decide.**"

Comment could not make the question of jurisdiction clearer or more emphatic.

The case of Commings vs. Chicago, 188 U. S. 410, involved the right to construct a dock in a navigable river by the riparian owners, in opposition to a police regulation by the state, but having the Federal assent. The plaintiffs, citizens of Illinois, filed their bill to enjoin the City of Chicago from interfering with the construction of the dock in the Calumet River.

The defendant demurred to the bill upon the ground that it did not state facts entitling the plaintiffs to the relief asked and the objection that no Federal question was involved was raised as in the case at bar. Mr. Justice Harlan disposed of this contention in the following very terse paragraph, at the outset of his opinion, after stating the facts:

"We hold that the circuit court had jurisdiction in this case. That the parties, plaintiffs and defendants are citizens of the same state is not sufficient to defeat the jurisdiction; for by the act of March 3d, 1887, chap. 373, as corrected by the act of August 13th, 1888, chap. 866, the circuit courts have jurisdiction, without reference to the citizenship of the parties, of suits at common law or in equity arising under the constitution or laws of the United States. 24 Stat. at L. 552, 25 Stat. at L.

433 (U. S. Comp. Stat. 1901, p. 508). The present suit does arise under the Constitution and laws of the United States, because the plaintiffs base their right to construct the dock in question upon the Constitution of the United States, as well as upon certain acts of Congress and the permit (so called) of the Secretary of War, which legislative enactments, and action of the Secretary of War were, it is alleged, in execution of the power of Congress, under the Constitution, over the navigable waters of the United States. Clearly, such a suit is one arising under the Constitution and Laws of the United States. That it is a suit of that character appears from the bill itself. The allegations which set forth a Federal right were necessary in order to set forth the plaintiff's cause of action."

The Findings of Fact, made and entered by the trial court, found on page 310 of the printed record, constitute the pleadings and case upon which a trial *de novo* was had before the Supreme Court of Washington, according to the practice in that state. Paragraph III, at page 311 of the printed record, recites that before beginning the construction of its boom, the defendant in error, plaintiff below, was granted permission by the war department to construct its said boom; and Paragraph VII, printed record, page 312, recites that plaintiff in error, defendant below, had a similar permission. Both parties recognized the necessity of a license from the Federal authorities and thus acknowledged Federal jurisdiction, thereby conceding that the abstract right to occupy the navigable waters of the United States, especially to the exclusion of others, is, necessarily, a Federal question. In its

opinion, printed record page 372, sixteenth line, the Supreme Court of Washington, referring to defendant in error, plaintiff below, states that," * * Before beginning the construction of its boom, it submitted to the secretary of war of the United States a plan of its proposed improvements and a plat of the territory to be occupied thereby, and was by said war department granted permission to construct a boom within the limits of said river covered by said plat of location. The territory designated by said plat of location embraces the shores of North River, which river is tributary to Willapa harbor, a bay leading into the Pacific Ocean, and the territory extends from near the mouth of the river on both sides for some distance up the stream."

As to the position of the plaintiff in error, defendant below, as to the Federal assent, the same court says at page 373, eleventh line:—

"It also claims that before commencing to construct its boom, it secured from the war department of the United States permission to construct within its said location. The plat of location filed by the defendant in the office of the secretary of state covered substantially the part of the territory embraced in the plat of the plaintiff, lying above the upper end of the sheer boom constructed by plaintiff as aforesaid."

And it further appears from the opinion, page 379, fourteenth line from bottom, that the court declined to consider whether plaintiff in error, defendant below, even had permission from the secretary of war to construct its boom.

It has been held by this court that the erection of a structure in a navigable river, within the limits of a state, depend upon the concurrent or joint assent of both the national government and the state government. The Secretary of War, acting under the authority conferred by Congress may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them.

Cummings vs. Chicago, 188 U. S. 410.
Montgomery vs. Portland, 190 U. S. 89.

As the authority over the navigable waters of the United States is paramount in Congress and any voice in their control by the states is only by the grace of Congress, which may be withdrawn at any time, as to what constitutes the assent of a state, to be concurrent with national assent, is *ipso facts*, a Federal question. To say that the assent of the state, in such cases, is purely a local matter and can only be decided by the state courts, and that in any controversy similar to this, the United States Courts can decide only as to whether there has been the necessary Federal assent, would lead to the most palpable absurdities.

The third assignment of error, laid by the plaintiff in error, is, in effect, that when the Secretary of War gave his permit or license to construct its boom, that such act was a revocation of so much of the permit or license granted to the defendant in error, three years before, as was covered by or included in the permit or license thus granted to the plaintiff in error.

The authority of the Secretary of War under the

act of Congress of September 19, 1890, the effect of his assent to the erection of structures in navigable waters and the estate granted thereby, whether revocable, and if revocable whether revocable by implication, and whether such assent carries with it vested rights, are, also, from their very nature, all Federal questions and in no sense purely local and of state concern only.

That a Federal question was involved, and no other, appears on the face of the opinion of the Supreme Court of Washington. (Printed record, page 372.)

It was the contention of the plaintiff in error, defendant below, that the Nicomen Boom Company had appropriated only so much of its located territory as it had reduced to actual possession and use for boom purposes, and that having allowed the remaining territory to lie idle, unused and unappropriated, it had abandoned the same, and that, therefore, it did not have the state assent.

But, as we have seen, the exception in the act of Congress is a structure authorized by a state law. In any case in which the Secretary of War might be called upon to exercise his authority under this statute, then, he must ascertain *first*, whether the state has taken jurisdiction, and, *second*, whether the conditions prescribed by the state had been complied with and amounted to an assent. If the Secretary of War must decide these matters, before he can act and to govern his action, they must be solely Federal questions. In this case, as the Secretary of War granted a license to the plaintiff in error to construct its boom within

territory not actually appropriated by the defendant in error and unused by it, he must have decided that the Nicomen Boom Company did not have the state assent at that time, whatever may have been the case three years before. If the territory occupied by the boom of plaintiff in error was unappropriated at the time it made its location then it had the state assent, as the state boom law is self-executing. The Washington Supreme Court held that the filing of a boom plat was analogous to the filing of a plat for right of way by a railroad corporation which would hold the location until actual abandonment and that therefore the defendant in error had the state assent and that plaintiff in error did not have such assent. This was the sole question in the case and from its very nature could only be a Federal question.

Blythe vs. Hinckley, 180 U. S. 333.

Am. Sugar R. Co. vs. Louisana, 179 U. S. 89.

Douglass vs. Wallace, 161. U. S. 346.

This Court, in Armstrong vs. Athens County, 16 Peters 281, states the principles by which its jurisdiction is governed in six paragraphs, the last of which reads as follows:—

"*Sixth.* It must appear from the record that the question was necessarily involved in the decision; and that the state court could not have given the judgment or decree, which they have passed without deciding it."

This case is cited in many cases, notably the following:

Moore vs. Mississippi, 21 Wall, 638.
Murray vs. Charleston, 96 U. S. 442.
Crossley vs. New Orleans, 108 U. S. 105.
Weatherby vs. Bowie, 131 U. S. ccxv.
Kaukauna vs. Green, B. C. 142 U. S. 69.
Gulfte R. R. vs. Hewes, 183 U. S. 269.

In Murray vs. Charleston, 96 U. S. 442, the rule is still more forcibly stated:—

"The true test of the jurisdiction of this court over state judgments is not whether the record exhibits an express statement that a Federal question was presented but whether such a question was decided and decided adversely to the Federal right."

Anderson vs. Carkins, 135 U. S. 483.

If it appears from the record by clear and necessary intendment that the Federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient to give jurisdiction.

Powell vs. Brunnswick Co., 150 U. S. 433.

It is not necessary that the treaty or act of Congress on which the Federal right is based should have been pleaded specially or spread upon the record. It is sufficient if the record shows that it must have been construed.

McCullough vs. Virginia, I72 U. S. 118.

Where a decision by the state Court of the Federal question appears to have been the foundation of the judgment a writ of error lies.

Wedding vs. Weyler, 192 U. S. 573.

Other cases in point, generally, are the following:

Covington vs. Sanford, 164 U. S. 595.

Mitchell vs. Clark. 110 U. S. 645.

Boyd vs. Nebraska, 143 U. S. 180.

Des Moines vs. Iowa H. Co., 123 U. S. 555.

Erie R. Co. vs. Purdy, 185 U. S. 148.

Snell vs. Chicago, 152 U. S. 191.

Muter vs. Montgomery, 156 U. S. 385.

Walter A. Wood Co. vs. Skinner, 139 U. S. 295.

Cook Co. vs. Calumet Dock Co., 138 U. S. 365.

C. B. &. Q. R. vs. Chicago, 166 U. S. 228.

THE STATE DECISION VIOLATES 14TH AMENDMENT

The navigable waters of the United States are not at the disposal of a contiguous state. The state may exercise police power, it may improve when not in conflict with plans of the general government, its courts may exercise jurisdiction over maritime contracts, *in personam*, and to a limited extent it has some powers, but that the authority of congress, in all substantive matters, is paramount and supreme is not possible of denial.

The decree of the Supreme Court of Washington awards to the defendant in error, not the located territory provided by the state boom statute leaving an unobstructed passage-way for commerce, **but the entire river from its mouth to the head of tide water** and excludes the plaintiff in error therefrom, without exemption, notwithstanding the fact that it is, also, a driving company and in spite of the inhibition of the State Constitution against the granting of exclusive rights and the conferring of a monopoly.

This decree vests the defendant in error with a monopoly upon one of the most important highways on the Pacific Coast and is in violation of the 14th Amendment.

That the decree violated the 14th Amendment in this respect was specially urged in the petition for re-hearing, and was denied by the court and thus a second Federal question was raised.

Minn. & St. L. R. C. vs. Minnesota, 193 U. S. 53.

GRANTING A SECOND LICENSE REVOKED THE FIRST LICENSE.

The Secretary of War granted a license to the defendant in error to construct its boom in North River. Three years later, three-fourths of the territory thus granted being vacant and unappropropriated, the Secretary of War granted a similar license to the plaintiff in error to occupy a portion of such unappropriated territory with a boom.

It is confidently submitted that this action by the Secretary of War is two-fold in effect:

First. It was an adjudication or finding, by a competent Federal official, that defendant in error did not have the requisite authority from the state to occupy the disputed territory; and

Second. The granting of the second license was a revocation of the first license.

Nichols vs. Peck, 70 Con. 439.
Wilson vs. St. Paul R. R., 41 Minn, 56.
Hazleton vs. Putnam, (Wis.) 3 Pin. 107.
Johnson vs. Skillman, 29 Minn. 95.
Dunham vs. Joyce, 129 Mo. 5.
Fischer vs. Johnson, 106 Ia. 181.

But these are all Federal questions and properly come within the jurisdiction of this Court upon appeal.

JURISDICTION, NOT MERITS, THE ISSUE.

This court will not weigh or decide the whole legal merits on this motion to dismiss but will inquire into them only as settling the question of jurisdiction; nor will it grant this motion where its consideration requires a consideration of the entire merits.

Minor vs. Tillotson, 1 How. 287.
Day vs. Washburn, 23 How. 309.
Hecker vs. Fowler, 1 Block, 95.
Semple vs. Hager, 4 Wall 431.
Lynch vs. DeBernal, 131 U. S. 94.
Bohanan vs. Nebraska, 118 U. S. 231.
Hill vs. C. & E. R. 129 U. S. 170.
Chicago L. Ins. Co. vs. Needles 113 U. S. 574
Cent. Land Co. vs. Laidley 159 U. S. 111.
Eureka L. & Y. C. Co. vs. Superior Ct. 119 U. S. 410.
Kaukauna W. P. Co. vs. Green B. & M. C. Co., 142 U. S. 269.
Board of Liquidation vs. Louisiana, 179 U. U. S. 622.

THIS MOTION IS A MISCONCEPTION

The position of the defendant in error upon this motion is put in a nutshell in Paragraph V, of its Points and Authorities, at page 17 of its brief.

It assumes that what constitutes "state authority or assent" is purely a matter of "local and state law," while we have seen in United States vs. Bellingham Bay Boom Company, *ante*, that it is wholly a federal question. And the cases cited, Cummings vs. Chicago and Montgomery vs. Portland, decide exactly the reverse of what is claimed for them in the brief.

NOTICE OF WRIT OF ERROR WAS GIVEN

The last ground of the motion to dismiss the writ of error for the reason that no citation had been served upon the defendant in error is untenable and without any basis in fact.

1. On March 26, 1907, the Sheriff of Pacific County personally served the defendant in error with a notice signed and issued by the Chief Justice of the Supreme Court of Washington which, omitting the venue and title, was as follows:

"A petition for a writ of error having been granted to the Supreme Court of the United States, the said writ of error being returnable on the twelfth day of May, A. D. 1907, from a judgment rendered in the Superior Court of the State of Washington, in and for the County of Pacific on the sixteenth day of January, A. D. 1906, in obedience to the mandate of the said Supreme Court of the State of

Washington, issued on the sixth day of December, A. D. 1905, in favor of the appellant, Nicomen Boom Company and against the respondent, North Shore Boom and Driving Company, reversing the former judgment and decree of the said Superior Court of the State of Washington, in and for the said County of Pacific, and directing a judgment and decree in favor of the appellant Nicomen Boom Company in accordance with the prayer of its complaint and the said respondent, North Shore Boom and Driving Company, having executed and filed its supersedeas bond in the sum of twenty thousand dollars and the same having been by me approved,

Therefore, the appellant, Nicomen Boom Company and all others are commanded to stay proceedings on said judgment and decree.

Witness my hand this 20th day of March, A. D. 1907.

(Seal of the Supreme Court, State of Washington)

HIRAM E. HADLEY,
Chief Justice of the Supreme Court
of the State of Washington.

Every material fact of which the defendant in error would be apprised by the service upon it of a common law form of citation, is set forth in the above notice, no matter by what name it may be called. And the notice was emphasized by the command to stay all proceedings contained therein.

In Dodge vs. Knowles, 114 U. S. 430, the citation was not served but the appelle was served with an order directing him to appear and argue the case and this court held a citation unnecessary.

2. The object of a citation is notice and where sufficient notice has been given by a stipulation and motion it is unnecessary.

United States vs. Gomez, 1 Wall. 690.
Goodwin vs. Fox, 120 U. S. 775.

As long ago as July 25, 1907, the parties to this writ, by their several attorneys, entered into a stipulation in writing, filed in this court, providing for the printing of the record. (Printed record pp. 411-2.)

The plaintiff in error has furnished a printed record in this case at an expense of over $1500. In entering into the stipulation the defendant in error reserved the right to object to the jurisdiction of this Court and it had in mind, apparently, at that time, the making of this motion. This stipulation saved to it the trouble and expense of printing a record upon which to base its motion.

Nor do we doubt that a receipt, in writing, for the printed record in this case executed by defendant in error, was in the hands of the Clerk of this Court weeks before this motion was served.

3. A citation was actually issued, although it does not appear to be accompanied by proof of service. (Printed record, p. 411.)

This Court has repeatedly held that if a citation was actually issued but not served before the first day of the term to which it was returnable, leave might be granted to make the service during the term.

Dayton vs. Lash, 94 U. S. 112.
Richards vs. Mackall, 113 U. S. 539.
Peugh vs. Davis, 110 U. S. 227.

HEARING IN DE NOVO IN STATE APPELLATE COURT.

Under the practice of the State of Washington, the hearing of an equity case in the Supreme Court is *de novo*, and if not excepted to, the findings of fact of the trial court constitute the pleadings in the Supreme Court.

Cadwell vs. First Natl. Bk., 3 Wash., 196.
Stenger vs. Roeder, 3 Wash. 419.
Boyer vs. Boyer, 4 Wash. 81.
Kirby vs. Collins, 6 Wash 297.
Kane vs. Kane, 35 Wash. 573.
Caughey vs. Rien, 37 Wash. 298,

The findings of fact made by the trial court fully disclosed each step taken by the parties to this action and their several action in seeking to comply with the Federal statute licensing the obstruction of a navigable stream. Hence a Federal question appeared affirmatively upon the record and a decision of the case could not be made without deciding a Federal question.

In conclusion, it is respectfully submitted that every material question arising upon the record in this case is a Federal question and that there is absolutely no basis for the motion at bar.

W. H. ABEL,
CHAS. E. MILLER,
JAMES B. HOWE,
SAMUEL H. PILES,
Attorneys for Plaintiff in Error.

IN

The Supreme Court of the United States

No. 359

October Term, 1907

NORTH SHORE BOOM & DRIVING COMPANY,
Plaintiff in Error,

v.

NICOMEN BOOM COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of Washington.

Reply Brief of Defendant in Error on Motion to Dismiss Writ of Error

I.

In brief of plaintiff in error in opposition to our motion to dismiss, counsel tries to show the court that the Federal question which will authorize a writ of error

from this court to the Supreme Court of the state was involved in this case in the state court. To support this contention counsel cite three cases, to wit:

United States v. Bellingham Bay Boom Co., 176 U. S. 218;

Cummings v. Chicago, 188 U. S. 410;

Montgomery v. Portland, 190 U. S. 89.

The first two of these cases were cases commenced in the Circuit Court of the United States and the Federal question there considered was the question of the jurisdiction of the Federal Circuit Court, and not that with reference to a writ of error from the United States Supreme Court to a state court. The Federal question which will sustain the jurisdiction of the Circuit Court is entirely different from the Federal question which will sustain jurisdiction in a writ of error from the United States Supreme Court to a state court.

In the case of United States v. Bellingham Bay Boom Company, the court was construing the River and Harbor Act of 1890. Prior to the passage of this act, the Bellingham Bay Boom Company had constructed a boom in the navigable waters of the United States. The act in question provided:

"That the creation of any obstruction *not affirmatively authorized by law* to the navigable capacity of any waters in respect to which the United States has jurisdiction is hereby prohibited."

The section also made it an offense to continue any such obstruction, and expressly conferred jurisdiction upon the Circuit Court of an injunction to prevent the obstruction, and provided that proper proceedings in equity to that end might be instituted by the Attorney

General of the United States. The defendant in that case defended on the ground that their structure was authorized by a state law, and therefore came within the exception in the United States act above referred to contained in the words "not affirmatively authorized by law." The court rightfully held that the United States act incorporated within its provisions the state laws which had theretofore been passed with reference to structures in waters within a particular state's jurisdiction, and that therefore the question of whether or not a structure was authorized by the state law became a Federal question by reason of the recognition in the Federal statute of a structure authorized by a state law.

On page 215 the court said:

"When Congress in 1890 passed the River and Harbor bill, we think the expression contained in Section 10, in regard to obstructions 'not affirmatively authorized by law,' meant not only a law of Congress but a law of the state in which the river was situate, which had been passed before Congress had itself legislated upon the subject. An obstruction created under the authority of a state statute under such circumstances, we cannot doubt was an obstruction 'affirmatively authorized by law.' When, therefore, the section continues and provides 'that any such obstruction * * * whether heretofore or hereafter created,' shall constitute an offense, it referred to an obstruction as described in the first sentence of the section, namely, an 'obstruction not affirmatively authorized by law.' If the obstruction were affirmatively authorized by a law of the state, it did not come within the condemnation of the section, and its continuance was therefore valid."

Again, on page 217:

"When the Attorney General, therefore, acts upon the authority conferred by this statute, he has the right to call upon the court, upon proper proofs being made, to enjoin the continuance of any obstruction not authorized by the statute, and the court has jurisdiction, and it is its duty to decide the question whether the existing obstruction is, or is not, affirmatively authorized by law. In such inquiry the court is bound to decide whether the boom as existing is authorized by any law of the state. When such law is claimed to be a justification for its creation or its continuance, that question is not for the state alone, but must necessarily be decided by the Federal court *in the course of exercising the jurisdiction conferred upon it by the Federal statute.*"

The right in that case was, therefore, a right directly claimed under a Federal statute, because the Federal statute expressly recognized such right. But that is an entirely different case from the right involved in the present case. That case is undoubtedly correctly decided, and the jurisdiction with reference to which that case is decided was the jurisdiction of the Circuit Court of the United States expressly conferred by the River and Harbor Act, and not the jurisdiction of the Supreme Court to review the judgment of a state court. We doubt very much if an action involving a similar point, even under the wording of the River and Harbor Act then in force, had been presented in a case brought in a state court taken up through the Supreme Court of the state, in which the state courts had decided that the boom structure was not authorized by the state law—I say that we doubt very much if the denial of the party's right under the state law by the state court would have

presented such a Federal question as would have authorized the Supreme Court of the United States to review; but, irrespective of that question, we desire to call the court's attention to the fact that the River and Harbor Act of 1890 was not the River and Harbor Act in force and governing the question involved in the present litigation. The act construed in the Bellingham Bay Boom case was the act of 1890, and found in 26 St. L., at pages 426, 454. The act in question in the present case, however, was the act of March 3, 1899, which is more restricted.

Section 10 of the act of 1899, 30 St. L. 1151; 6 Fed. Stat. An. 813, provides:

"That the creation of any obstruction not affirmatively authorized by *Congress*, to the navigable capacity of any of the waters of the United States, is hereby prohibited." whereas, the act of 1890 prohibited any obstruction "not affirmatively authorized by *law*."

The act of 1899, therefore, does not incorporate into its provisions, as does the law of 1890, the state statutes authorizing obstructions within the waters within their boundaries, but excepts only the structures authorized by *Congress*. This latter act, however, has been interpreted by the Supreme Court as not assuming the exclusive jurisdiction over navigable waters of the United States within the boundaries of a state, but any obstruction in such waters must be authorized both by Congress, as provided in this act of 1899, and by the state authority; i. e., before any obstruction in a navigable water of the United States lying within the boundaries of a state is lawful, it must be authorized by Congress and also by the state authorities. Under this act, therefore, whether or not a person has obtained the

authority of the United States to build a structure, or, having obtained such authority, if a state court should hold that he had not obtained such authority, that question would be such a Federal question as would authorize a writ of error from the Supreme Court of the United States to a state court, provided a claim of such right under the act of Congress was made within the state court, and within the proper time. But the question of whether or not a person has obtained authority from the state, in any event since the passage of the law of 1899, we submit cannot interest the Federal authorities one way or the other; it is a matter purely between the state and the individual claiming a right under a state law, and a decision of a state court holding that a particular person had no authority under the state law to create an obstruction in a river within its boundaries, could present absolutely no question which would authorize a writ of error from the United States Supreme Court to the state court. Such a decision by the state court would not be a decision against any title, right, privilege or immunity specially set up or claimed by a party under the constitution, treaty, statute, commission, or authority exercised under the United States.

By the reading of the decision of the Supreme Court of the state, as pointed out in our opening brief, it will be seen that the state decision was simply to the effect that the defendant in error had acquired the prior right under the state law; had acquired such rights under that law as were exclusive, and that the plaintiff in error, by attempting to comply with the state law with reference to a portion of the stream where the defendant in error's rights were still valid, acquired nothing under the state law; i. e., the court's decision was simply a

holding to the effect that the plaintiff in error had acquired no right or authority under the state statute, and had, therefore, not acquired the state's assent to his structure in the river. The state court refused to pass upon the rights of the respective parties under the River and Harbor Act, because, in view of its holding with reference to the rights of the respective parties under the state law, that question was immaterial.

The other two cases cited were the cases of Cummings v. Chicago, 188 U. S. 410, and Montgomery v. Portland, 190 U. S. 89.

The case of Cummings v. Chicago was a case taken up through the United States courts. The case of Montgomery v. Portland was on writ of error to the state court. In neither of those cases was a right claimed under the state law denied. In the Cummings case the party had absolutely no permit or authority from the state, and was claiming entirely under his permit from the United States Secretary of War, and his permit under the United States authority was denied because he had not also secured some authority from the state.

In the Montgomery v. Portland case, the harbor line established by the United States authority extended out further into the river than the harbor line established under the state authority. Mo. mery, claiming the right to construct his wharf out to the extent of the harbor line established by the United States authority, was not denied any right under a state authority, because he had no state authority out beyond the line established by the state, and his right, which was denied in that case, was the right he claimed under the United States authority and not under the state authority; but in the present

case the denial of the right was not a denial of the right under the United States authority at all, for the court did not pass upon that question. But the authority which was denied, and which the plaintiff in error is now attempting to assert was the denial of a right under the United States statute, was the denial by the state of any right under the state statute.

We submit, therefore, that the cases relied upon by the plaintiff in error to establish the fact that a Federal question was involved, are not in point in the present case.

II.

The plaintiff in error has entirely failed to show that any Federal question was especially set up or claimed in the state court. We pointed out in our opening brief, at page 25, that the plaintiff in error had never set up or claimed a right under the statute which it is now attempting to claim under, and we called the court's attention to the state of the record. It is well settled by the long line of decisions that, in order to review in this court a state court's decision on the ground on which this judgment is attempted to be reviewed, the title, right, privilege or immunity claimed under the constitution, treaty, statute, commission or authority, must be specially set up or claimed in the state court to give the United States Supreme Court jurisdiction.

Home for Incurables v. N. Y., 187 U. S. 155;
Bollin v. Nebraska, 176 U. S. 83;
Telluride Power Transmission Co. v. Rio Grande Western Ry. Co., 175 U. S. 639.

The fact that Federal questions were discussed in the opinions of the state court gives no right to review in the United States Supreme Court, where no claim under the constitution, laws or treaty of the United States were presented to the highest court of the state.

Howard v. Fleming, 191 U. S. 126.

The attempt to review this action in the United States Supreme Court was an afterthought on the part of the plaintiff in error and not thought of until long after the decision of the State Supreme Court. As shown in our opening brief on this motion, at page 25, the plaintiff in error's original brief in the state court is not in the record, but its petition for rehearing is found at page 381 of the transcript, and by a perusal of which the court will readily see that not one mention of any claim or right under a Federal statute is made, and by the opinion of the State Supreme Court (transcript, page 372) it will be seen that the plaintiff in error raised no question whatever of any right or claim under a Federal statute. It is true that the defendant in error, who was the appellant in the State Supreme Court, raised the question of the plaintiff in error's right under the United States law, and the opinion of the Supreme Court shows this at page 397, where it says:

"*Appellant* further urges that the record shows that the respondent's (defendant in error) boom and location are not lawful, in that no sufficient permit has been granted to it by the War Department of the United States. For reasons above stated it is unnecessary that we shall examine that question."

But the raising of this question by the defendant in error in the state court cannot be availed of by the plaintiff in error, even if the State Supreme Court had decided that question, for the reason that this court has held that the question must have been raised in the state court by the individual who seeks to have it reviewed in the United States Supreme Court.

In Sully v. American National Bank, 178 U. S. 289, this court holds:

A plaintiff in error in this court must show that he has himself raised the question in the state court which he argues here, and it will not aid him to show that some one else has raised it while he himself fails to do so.

The only question raised in the state court, therefore, of the plaintiff in error's rights under the United States law, was raised by the defendant in error, and, as seen, the state court expressly refused to pass upon that question.

Furthermore, we desire to call the court's attention in this connection to the fact that in and by the pleadings no question on this score is raised by the plaintiff in error. The complaint sets up the defendant in error's title. (Transcript, page 287.) The answer is simply a denial of the title set up by the defendant in error. (Transcript, page 297; supplemental complaint, page 301; answer to supplemental complaint, page 302.) The plaintiff in error set up no claim whatever in the pleadings or in the record at all.

It has been held by this court that the title, right, privilege or immunity claimed must be personal to the plaintiff in error. He is not entitled to a review where the title, right, privilege or immunity was asserted by

the other party and the decision was in favor of that party and adverse to himself.

DeLamar's Gold Mining Co. v. Nesbitt, 177 U. S. 527, 528.

On page 19 of the plaintiff in error's brief, counsel says:

"This decree invests the defendant in error with a monopoly on one of the most important highways of the Pacific Coast, and is in violation of the Fourteenth Amendment; that the decree violated the Fourteenth Amendment in this respect was specially urged in the petition for rehearing, and was denied by the court, and thus a second Federal question was raised."

The Supreme Court of Washington denied the petition for rehearing without argument and without opinion. (Transcript, page 381.)

This court has repeatedly held that it is not sufficient to make a claim under a statute or the constitution of the United States for the first time in a petition for rehearing after judgment, but that the same must be presented fairly and squarely to the state court at the proper time.

Mutual Life Ins. Co. v. McGrew, 188 U. S. 309;
Turner v. Richardson, 180 U. S. 92;
Capital National Bank v. Cadiz National Bank, 172 U. S. 425;
Myer v. Richmond, 172 U. S. 82.

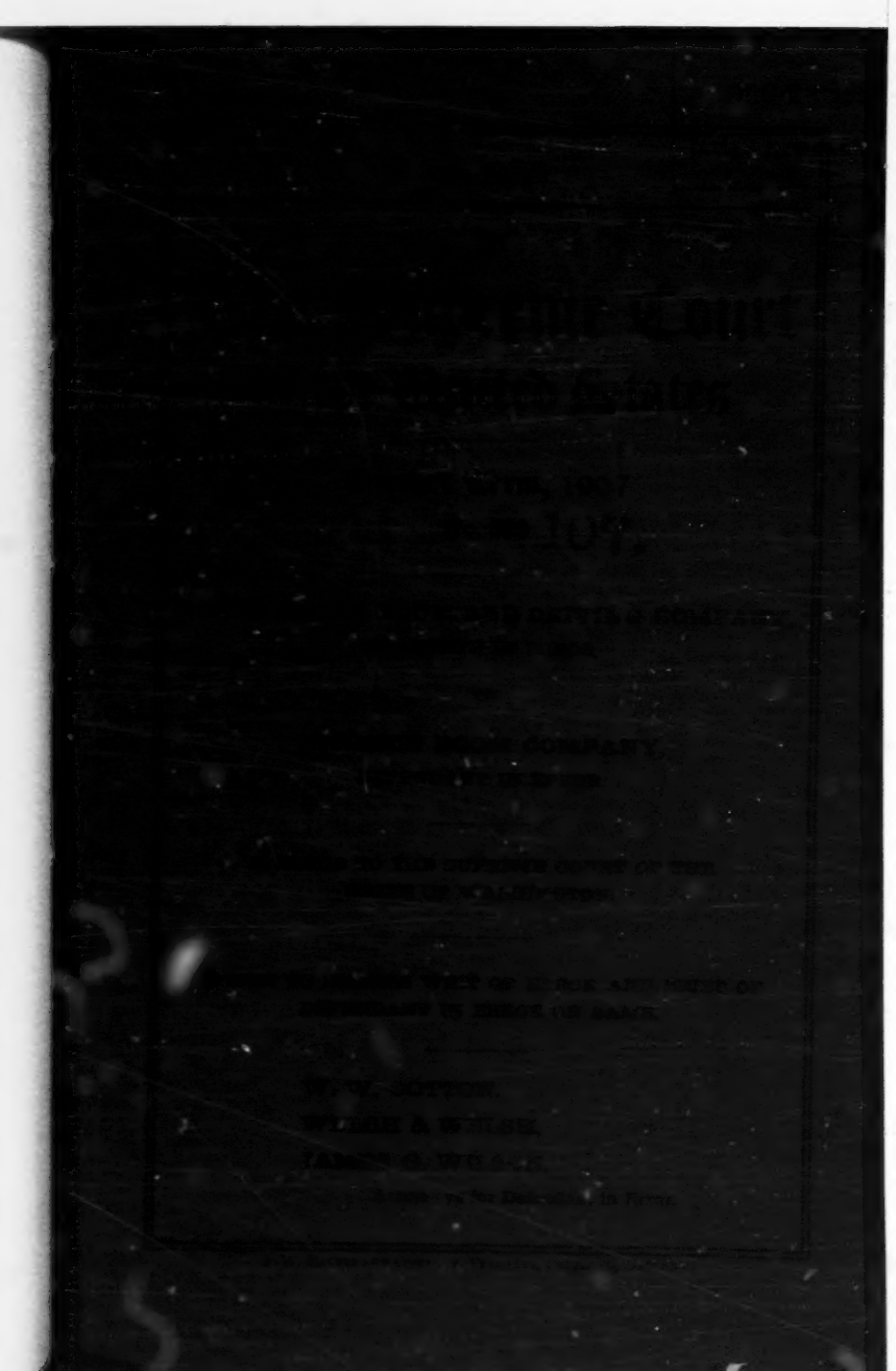
We assert that counsel's statement that the question of the repugnancy of this decision to the Fourteenth Amendment was raised in the petition for rehearing is

not sustained by the record (transcript, page 381); and, further, even if sustained by the record, the same was raised too late for review in this court.

The plaintiff in error's brief is entirely silent as to any portion of the record that shows it presented the question to the state court. As a matter of fact, counsel cannot point out any place in the record where the same was so submitted or presented, and this writ of error to this court is frivolous, and is taken simply for the purpose of delay, and we submit that the same should be dismissed.

Respectfully submitted,

W. W. COTTON,
WELSH & WELSH,
JAMES G. WILSON,
Attorneys for Defendant in Error.



No. 20762

IN

The Supreme Court of the United States

October Term, 1907

No. 359

NORTH SHORE BOOM & DRIVING COMPANY,
Plaintiff in Error,
v.
NICOMEN BOOM COMPANY,
Defendant in Error.

NOTICE

To North Shore Boom & Driving Company, Plaintiff in Error, and to W. H. Abel, Chas. E. Miller and Piles, Howe & Farrell, your Attorneys:

You are and each of you is hereby notified that the defendant in error, the Nicomen Boom Company, will submit its motion to dismiss the writ of error heretofore issued in this cause from the Supreme Court of the United States to the Supreme Court of the State of Washington, at the court room of the United States Supreme Court in Washington,

District of Columbia, on Monday, January 20th 1908, on the convening of said Court, or as soon thereafter as the same can be submitted. A copy of which said motion to dismiss and brief of argument thereon is herewith served upon you.

W. W. COTTON,
WELSH & WELSH,
JAMES G. WILSON,
Attorneys for Defendant in Error.

Due service of the foregoing notice and motion to dismiss the writ of error referred to and brief of argument thereon, and receipt of copy thereof is hereby acknowledged, at _____, this _____ day of December, 1907.

_____

_____

Attorneys for Plaintiffs in Error.

IN

The Supreme Court of the United States

October Term, 1907

No. 359

THE NORTH SHORE BOOM & DRIVING COMPANY,
Plaintiff in Error,
v.
NICOMEN BOOM COMPANY,
Defendant in Error.

MOTION TO DISMISS WRIT OF ERROR

Comes now the defendant in error above named, the Nicomen Boom Company, and moves the Court for an order that the writ of error heretofore issued by A. Reeves Ayers, clerk of the United States Circuit Court for the Western District of Washington, and made returnable to the Supreme Court of the United States within 60 days from the date of said writ, and which said writ was directed to the Supreme Court of the State of Washington, to review the judgment in the cause wherein the Nicomen Boom Company was plaintiff and appellant, and North Shore Boom & Driving Company was de-

fendant and appellee, said writ of error being dated 13th day of March, 1907, be dismissed and held for naught, on the following grounds and for the following reasons, to-wit:

First. That there was not drawn in question in said decree or judgment of the Supreme Court of the State of Washington, or the judgment of the Superior Court of Washington for Pacific County, entered in accordance with the mandate of the Supreme Court, or in the issue in the suit in which said judgment or decree was entered, the validity of any treaty or statute of, or any authority existing under, the United States, nor was said decree or decision in said suit against the validity of any treaty or statute of, or any authority exercised under, the United States.

Second. That there was not drawn in question in said decree or judgment in said suit, nor in said suit in the state Court, the validity of any statute of, or authority exercised under, any state, on the ground of its being repugnant to the Constitution, or any treaty, or any law, of the United States, nor was said decree or judgment a decision in favor of the validity of any statute of, or any authority exercised under, any state, where the validity of the same was drawn in question on account of its being repugnant to the Constitution, or any treaty or law, of the United States.

Third. That no title, right, privilege or immunity was claimed by the plaintiff in error in said Supreme Court of the State of Washington, under the Constitution, or any treaty, or any statute, of, or of any commission held, or authority exercised under the United States, nor was said decree or judgment a decision against any title, right, privi-

lege or immunity specially set up or claimed by the plaintiff in error, under the Constitution, or any treaty, statute, commission or authority of the United States.

Fourth. That said decree and decision of the said Supreme Court of the State of Washington, and the judgment of the Superior Court entered in accordance with the mandate of the said Supreme Court, was based upon, and raised the grounds of local law, and does not involve a Federal question, nor was any Federal question decided by, or necessary to the decision of, the said Supreme Court.

Fifth. That the decision and decree or judgment of the said Supreme Court of Washington, and the judgment of the Superior Court entered in accordance with the mandate of the Supreme Court, did not necessarily involve a decision of a Federal question, nor was the decision of a Federal question necessary to sustain the same, and did not in fact involve a Federal question, but was based upon grounds independent of any Federal question.

Sixth. That no question attempted to be presented to this Court by the plaintiff in error in order to sustain the writ of error herein, was specially set up or claimed, or drawn in question by the said plaintiff in error, in any Court of the State of Washington, and that no such question was considered or passed upon by the said state Court.

Seventh. That the decision of the Supreme Court of the State of Washington was not against any title, right, privilege or immunity specially set up or claimed by the plaintiff in error, under the Constitution, or any treaty, or statute, or commission, or authority, of the United States.

Eighth. That no citation as required by law was ever served on defendant in error.

This motion is based upon the record returned to this Court in response to the writ of error issued herein, and as contained in the printed transcript of the same, and upon the records and files in said cause.

W. W. COTTON,
WELSH & WELSH,
JAMES G. WILSON,
Attorneys for Defendant in Error.

(Where reference to the transcript in this brief is made, it refers to the page of the printed transcript of record compiled by the clerk of this Court and not to the paging of the original transcript as shown in the margin of the printed transcript.)

STATEMENT

This is a motion to dismiss the writ of error heretofore issued to the Supreme Court of Washington, to review as it appears from the writ of error itself, a judgment of the Supreme Court of the State of Washington in the case entitled Nicomen Boom Company, a corporation, plaintiff and appellant, vs. North Shore Boom & Driving Company, defendant and appellee. (Trans., p. 407, 410.) It appears from the application for writ of error, however (Trans., p. 404), that plaintiff in error was trying to secure a writ of error from the United States Supreme Court to the Supreme Court of Washington to review a judgment of the Superior Court of the state entered in pursuance to the mandate of the Supreme Court of the state.

The opinion of the Supreme Court of the state was made and filed on September 30, 1905 (Transcript, p. 372), and the judgment of the Superior Court of the state was made and filed on the 6th day of December, 1905 (Transcript, p. 381). The judgment of the Superior Court of Pacific County entered in accordance with the mandate of the Supreme Court of the state was made and entered on January 16, 1906. (Trans. p. 394.)

The plaintiff in error bases its right to a hearing in this Court upon the ground that a right claimed by it under a statute of the United States was denied by the decision of the state Court. The statement of its right to a review here is set forth in its application for writ of error (Trans., p. 404), as follows:

"And your petitioner further represents that this action involves the question of the right on the

part of your petitioner to construct a boom in a navigable river within the United States, for the purpose of catching, sluicing, booming and rafting sawlogs and other timber products, under the Act of Congress of September 19, 1890, page 907, 26 Statutes at Large, 426, and a permit thereunder from the Secretary of War, your petitioner's rights thereunder having been denied by said decree."

The assignments of error filed by plaintiff in error are as follows:

Now comes the said plaintiff in error, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Washington, in the above-entitled matter, there is manifest error in this, to-wit:

1. For that the Court erred in not finding and deciding that plaintiff in error had a good and valid permission from the Secretary of War to construct its said boom.

2. For that the Court erred in finding and deciding that the defendant in error had a good and valid permission from the Secretary of War to hold the territory occupied by the boom of plaintiff in error for its contingent future necessities.

3. For that the Court erred in not finding and deciding that the permit and license granted by the Secretary of War to plaintiff in error to construct its said boom operated as, and was a, revocation of the permit and license previously granted by the Secretary of War to construct its said boom.

4. For that the Court erred in finding and deciding that at the time of the commencement of this action the defendant in error was entitled to the possession of, and to hold, the entire area covered

by its plat as filed in the office of the Secretary of State of Washington.

5. For that the Court erred in finding and deciding that the defendant in error had a right prior to that of the plaintiff in error, to the area covered by the said boom of plaintiff in error.

6. For that the Court erred in not finding and deciding that the defendant in error appropriated only so much of the area included within its said plat as filed in the office of the Secretary of the State of Washington, as was, at the time of the filing of the said plat of the plaintiff in error in the office of the Secretary of the State of Washington, actually used and occupied by it, the defendant in error, for boom purposes.

7. For that the Court erred in not finding and deciding that the defendant in error appropriated so much only of the area of the waters of the said North River, as was in actual use by it for boom and rafting purposes at the time it completed its said boom.

8. For that the Court erred in reversing the finding and judgment of the Superior Court of the State of Washington, in and for the County of Pacific.

9. For that the Court erred in giving and entering its said judgment in favor of the defendant in error.

10. For that the Court erred in giving and entering judgment impairing and violating the rights of the plaintiff in error under the fourteenth amendment of the Constitution of the United States.

W. H. ABEL,
Attorney for Plaintiff in Error.

(Trans., p. 405.)

The cause involved conflicting rights in a portion of North River claimed by both parties as a location for log booming purposes. It was commenced originally in the Superior Court of the State of Washington for Pacific County, by the defendant in error against the plaintiff in error, for an injunction to restrain the plaintiff in error from building a boom in North River, within the location of the defendant in error.

North River is a tributary of Willapa Harbor, an arm of the Pacific Ocean, and lies wholly within the State of Washington.

Each of the parties is a boom company.

The booming laws of Washington, which will be found in §4378 to 4394 of Ballinger's Code and Laws of Washington, provide that a corporation, organized for the purpose of doing a booming business, shall, within ninety days after its organization, file with the Secretary of State a plat or survey of the property or properties to be appropriated for its business. These companies are given the power of eminent domain and required to boom logs for all persons requiring their services. They are made liable for damages for failure to do this, or for any loss of logs through negligence.

Both parties had filed plats or surveys as provided in the said law covering, however, a portion of the same area, the filing of the plat of the defendant in error being prior to that of the plaintiff in error by about three years. The defendant in error shortly after filing its plat constructed a boom on a portion of the territory included in its plat, but did not extend the same throughout the entire area included in said plat. The plaintiff in error, after the defendant in error had operated for about three

years its boom as at first constructed was organized, and filed its plat under the state law covering a portion of the area in plat of defendant in error which had not been built on. The plaintiff in error began construction of a boom in this area claimed by defendant in error and the suit was thereupon commenced. In its complaint and supplemental complaint in the trial Court the defendant in error based its right to an injunction upon its prior compliance with the state law. (Plaintiff's complaint, Trans., p. 287-295, and supplemental complaint, Trans., pp. 301-302.) The plaintiff in error in its answers contented itself with a denial of the cause of suit set up in the complaint and supplemental complaint and did not plead or set up any affirmative defense or justification under the law of the United States referred to in its application for writ of error, assignments of error supra or under any law of the United States (Answer, Trans., pp. 297-300, and Answer to Supplemental Complaint, Trans., p. 302.)

On the trial each party introduced evidence tending to show a permission from the Secretary of War under the River and Harbor act.

In the issues joined there was no question raised of the repugnancy of the state booming laws to the Constitution of the United States, or any law, or treaty of the United States, nor was any claim specially set up by the plaintiff in error of an authority in it under the United States, or under any statute of the United States.

The Superior Court found against the defendant in error and gave judgment in favor of the plaintiff in error. In its findings of fact said Court found that the defendant in error had complied with the State law in filing its map of location, and also had

complied with the United States law, and had acquired a license or permit from the Secretary of War to build its boom throughout its located territory. (See Findings of Fact Nos. 1 and 3, Trans., pp. 310 and 311.)

The said Superior Court also found that the plaintiff in error had filed its map of location, as required by said law, subsequently to the defendant in error, and the only permit from the Secretary of War said plaintiff in error ever had was a certain letter as follows:

> United States Engineer's Office,
> Seattle, Washington, March 23, 1903.

Mr. John F. Hobi, South Bend, Washington.

Dear Sir:—Referring to your application of February 7, 1903, for permission to construct and maintain a boom for storage of logs in North River, Pacific County, Washington, the Secretary of War directs that you be informed that the War Department will interpose no objection to its construction and maintenance in the manner proposed so long as it does not unreasonably interfere with navigation.

By direction, and in the absence of Major Millis.

Very respectfully,

JAS. H. MURPHY, Chief Clerk.

(Trans., p. 312.)

As shown above, the plats of location of both parties covered a portion of the same territory, and this conflicting territory was the location in dispute.

The defendant in error, in constructing its boom, had not built the same throughout the entire length of the located territory, as shown on its plat filed with the Secretary of State, but had built the same

to an extent sufficient to handle the business at the time. The said Superior Court further found that the defendant in error always intended to build its boom throughout the territory shown on its plat as the development of the business required. (Finding of Fact No. 5, Trans., p. 311.)

But because of the fact that the defendant in error did not construct throughout its entire location at the beginning, the said Superior Court decided that it had abandoned or forfeited, under the state law, that portion not built upon, and that therefore the plaintiff in error had a right to build thereon its boom, and therefore decided in favor of the plaintiff in error. (Memorandum Decision of Superior Court, Trans., pp. 274 and 275.)

The defendant in error appealed to the Supreme Court of the State of Washington from the judgment of said Superior Court. (Trans., pp. 325-326.) The Supreme Court of Washington reversed the judgment of the Superior Court. This judgment of the Supreme Court, or the judgment of the Superior Court entered in pursuance thereof, is the judgment of the state Court that is sought to be reviewed in this Court in this proceeding. The judgment of the Supreme Court is found in the transcript, at page 381, and is as follows, omitting the title:

"This cause having been heretofore submitted to the Court upon the transcript of the record of the Superior Court of Pacific County, and upon the argument of counsel, and the Court having fully considered the same, and being fully advised in the premises, and having filed its opinion in writing, it is now, on the 6th day of December, A. D. 1905, on motion of W. W. Cotton, Esq., of counsel for appellant, considered, adjudged and decreed that the

judgment of the said Superior Court be, and the same is hereby, reversed, with costs, the petition for rehearing denied, and the said Nicomen Boom Company have and recover from the said North Shore Boom & Driving Company the costs of this action taxed and allowed at $313.20, and that execution issue therefor.

"It is further ordered that this cause be remitted to the said Superior Court for further proceedings in accordance with the opinion herein filed."

The opinion referred to in said judgment, setting forth the grounds on which said judgment is based, is to be found in the transcript, at pages 372 to 380.

POINTS AND AUTHORITIES

I.

Where the first mention made of any Federal question is in the assignment of error, or in the petition for a writ of error, the raising of the Federal question comes too late. The assignment of error is no part of the record below, and a Federal question stated therein for the first time is not sufficient to give jurisdiction to the Supreme Court of the United States on writ of error to a state Court.

Corkran Oil Co. v. Arnaudet, 199 U. S. 193;
Chapin v. Fye, 179 U. S. 127;
Fullerton v. Texas, 196 U. S. 192;
Allen v. Arguimbau, 198 U. S. 149;
Leeper v. Texas, 139 U. S. 462.

II.

The only appellate jurisdiction which has ever been conferred by Congress upon the Supreme Court of the United States to review judgments or decrees of the highest courts of a state, is by writ of error:

Dower v. Richards, 151 U. S. 666;
Cohens v. Virginia, 6 Wheat. 264, 410;
Verdens v. Coleman, 22 How. 192.

and that only in cases within the purview of section 709 of the Revised Statutes.

Capital Bank v. Cadiz Bank, 172 U. S. 430.

III.

A writ of error from the Supreme Court of the United States to the Supreme Court of a state, can be sustained only when the decision is against the right specially set up or claimed under the Constitution and laws of the United States, and if the decision of the state court rests upon independent grounds of law, sufficient to sustain it but not involving a Federal question, the Supreme Court of the United States has no jurisdiction and will dismiss the writ of error, and this, even in a case where a Federal question is also decided.

Taylor on Jurisdiction and Procedure of U. S. Supreme Court, §§238-240.
Rutland R. R. Co. v. Central of Vermont R. R. Co., 159 U. S. 638;
Eustis v. Bolles, 150 U. S. 366;
Cal. Powder Co. v. Davis, 151 U. S. 393;
Giles v. Teasley, 193 U. S. 160;
Sawyer v. Piper, 189 U. S. 156;
Harrison v. Morton, 171 U. S. 46;
Allen v. Arguimbau, 198 U. S. 154;
Chapin v. Fye, 179 U. S. 128;
Corkan Oil Co. v. Arnaudet, 199 U. S. 193;
Fullerton v. Texas, 196 U. S. 192;
Capital Bank v. Cadiz Bank, 172 U. S. 425;
Dower v. Richards, 151 U. S. 666;
Egan v. Hart, 165 U. S. 188;
McMillan v. Ferrum Min. Co., 197 U. S. 343.

IV.

The mere fact that the controversy arose out of a location in a navigable water in the United States, or under a statute of Congress, would not necessarily raise a Federal question within section 709 of the Revised Statutes.

Egan v. Hart, 165 U. S. 188;
McMillan v. Ferrum Min. Co., 197 U. S. 347;
Telluride P. T. Co. v. Rio Grande W. R. Co., 175 U. S. 643.

V.

The effect of the tenth section of the River and Harbor Act is to make the erection of a structure in a navigable river within the limits of a state dependent upon the concurrent or joint assent of both the National Government and the state government. The question of whether or not the assent of the National Government had been acquired might raise a Federal question and authorize a writ of error, but the question of whether or not the assent of the state had been obtained, is purely a matter of local and state law and does not involve a Federal question.

Cummings v. Chicago, 188 U. S. 431;
Montgomery v. Portland, 190 U. S. 103.

ARGUMENT

I.

The plaintiff in error bases its right to a hearing in this Court on the ground that a right, claimed under a statute of the United States, was denied by the Supreme Court of the State of Washington, stating its right in its application for writ of error, as follows:

"And your petitioner further represents that this action involves the question of the right on the part of your petitioner to construct a boom in a navigable river within the United States, for the purpose of catching, sluicing, booming and rafting sawlogs and other timber products under the Act of Congress of September 19, 1890, Chap. 907, 26 Stat. L. 426, and a permit thereunder from the Secretary of War, your petitioner's rights thereunder having been denied by said decree. (Trans., p. 404.)

In the last assignment of error, in addition to the right claimed under this statute, it would seem that the plaintiff in error is attempting to set up some right under the fourteenth amendment to the Constitution of the United States; but inasmuch as this statement of the same in the assignment of error is the first mention made of any such constitutional question, we will not discuss the point with reference thereto, but will simply call the attention of the Court to a number of decisions in which it holds that the assignment of error is no part of the record below, and that a Federal question stated therein for the first time, is not sufficient to give jurisdiction to this Court on writ of error:

Corkran Oil Co. v. Arnaudet, 199 U. S. 193;
Chapin v. Fye, 179 U. S. 127;

Fullerton v. Texas, 196 U. S. 192;
Allen v. Arguimbau, 198 U. S. 149;
Leeper v. Texas, 139 U. S. 462.

As to the other point, to-wit, that a right claimed under a United States statute was denied, we also contend that it was not presented by the record in the Court below. The question was not decided in the Supreme Court of the State of Washington, nor in any court in the State of Washington, and, furthermore, that if such a question were presented and decided by the said Court, then there were two grounds upon which the state Court's decision rested, one of which was a non-Federal question, and the decision upon this non-Federal question was broad enough to sustain the judgment of the state Court.

In this connection, we will call the Court's attention first to the principle of law which has been so thoroughly established by the repeated decisions of this Court, and then we will call attention to the state of the record.

It has been repeatedly held that the only appellate jurisdiction which has ever been conferred by Congress on the Supreme Court of the United States to review judgments or decrees of the highest court of a state, is by writ of error.

Dower v. Richards, 151 U. S. 666;
Cohens v. Virginia, 6 Wheat. 264, 410;
Verdens v. Coleman, 22 How. 192.

and that only in cases within the purview of Section 709 of the Revised Statutes.

Capital Bank v. Cadiz Bank, 172 U. S. 430.

There are, therefore, just three classes of cases in which a writ of error will lie from this Court to a state court.

The plaintiff in error tries to justify under the third of these classes enumerated in Section 709, to-wit: That

"Where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute, or commission held, or authority exercised, under the United States, and the decision is against the title, right, privilege, or immunity, specially set up or claimed by either party under such constitution, treaty, statute, commission or authority."

This section of the Revised Statutes has been construed by this Court in a great many cases, and it is well established by those decisions that a writ of error from this Court to the Supreme Court of a state can be sustained only when the decision of the state court is against the right specially set up or claimed under the Constitution and laws of the United States, and if the decision of the said court rests on independent grounds of law sufficient to sustain it but not involving a Federal question, the Supreme Court of the United States has no jurisdiction and will dismiss the writ of error.

In Rutland R. R. Co. v. Central of Vermont R. R. Co., 159 U. S., at page 638, the Court says:

"The decree below, as appears by the mandate of the Supreme Court of Vermont, and still more clearly by its opinion, made part of the record, and reported in 63 Vermont 1, did not proceed exclusively on the decision of a Federal question, but also upon grounds of general law.

"The conclusion of that Court * * * that the statute of Vermont of 1882 * * * was unconstitu-

tional, was in favor of the Rutland Railroad Company, and therefore cannot be questioned upon a writ of error sued out by that company.

"The Court did declare that the provision of the statute, which requires the lessee to pay the tax and deduct the amount from the rent, does not impair the obligation of a contract. * * *

"But the decision of this part of the case (the only part decided against the plaintiff in error) was not put upon that consideration alone. On the contrary, the Court went on to say: 'But it by no means follows, because the defendant has paid to the state taxes, under a law afterwards held to be void, by withholding the amount thereof from the rent, that the Rutland Company can now claim the balance of the rent for this reason.' And this proposition was rested on several distinct grounds."

At page 640, the Court says:

"It is well settled, by a long series of decisions of this Court, that where the highest court of a state, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground, not involving a Federal question, and broad enough to support the judgment, the writ of error will be dismissed, without considering the Federal question." Citing a great many authorities.

In Eustis v. Bolles, 150 U. S., at page 366, it is stated:

"It is settled law that, to give this Court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for a decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided

adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it." (Citations.)

"It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this Court will not review the judgment."

And again, in the case of California Powder Co. v. Davis, 151 U. S., at page 393, the Court says:

"It is axiomatic that, in order to give this Court jurisdiction on writ of error to the highest court of a state in which a decision in the suit could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this Court without considering any Federal question that may also have been presented."

To the same effect see:

Taylor on Jurisdiction and Procedure of the U. S. Supreme Court, §§238-240.

Giles v. Teasley, 193 U. S. 160;

Sawyer v. Piper, 189 U. S. 156;
Harrison v. Morton, 171 U. S. 46;
Allen v. Arquimbau, 198 U. S. 154;
Chapin v. Fye, 179 U. S. 128;
Corkran Oil Co. v. Arnaudet, 199 U. S. 193;
Fullerton v. Texas, 196 U. S. 192;
Capital Bank v. Cadiz Bank, 172 U. S. 425;
Dower v. Richards, 151 U. S. 666;
Egan v. Hart, 165 U. S. 188;
McMillan v. Ferrum Min. Co., 197 U. S. 343.

In view of these decisions a reading of the opinion of the Supreme Court of the State of Washington, setting forth the grounds of its judgment sought to be reviewed in the present case, will convince the Court that no Federal question was decided by the Supreme Court of the State of Washington.

That decision and opinion, found at page 372 of the transcript, is based entirely upon the rights of the respective parties, and particularly the defendant in error, under the booming laws of the State of Washington. The Court, in the first part of its opinion, reviews the established facts in the case. It then proceeds to define the nature of the boom companies under the statutes of Washington, holding that such companies are quasi-public corporations, having the power of eminent domain. It then proceeds to determine what rights a boom company acquires by the filing of a plat of location, as required by the boom laws, holding that, by the filing of a plat of location the corporation acquires a right to construct its boom throughout the same, which

right is exclusive as to all other boom companies seeking the same right in the same area. (Trans., p. 376.)

The decision then goes on and determines that the defendant in error, by failing to construct its boom in the territory in dispute, had not forfeited its right thereto, but that in filing its location map it had the right to take into consideration the future necessities of its business, and file upon sufficient area to allow and provide for the reasonable development of the business. It then holds that defendant in error, having acquired the first right under the booming laws of the State of Washington, and having neither abandoned nor forfeited this right, it had such a right as would be protected by injunction; that is, the decision is based upon the respective rights of the two companies, as determined by the state law, without any question having been raised of any conflict of this law with the laws or Constitution of the United States, and was a decision upon a question merely of local state law and did not involve any Federal question.

The decision on this ground was sufficient to sustain the judgment, and the judgment was in fact so based upon this ground alone, the Court refusing to consider any other ground or question raised.

It is true that other questions were raised, and, among them, the defendant in error, who was appellant in the Supreme Court of the State of Washington, attacked the sufficiency of the permit from the Secretary of War to the plaintiff in error, under the River and Harbor Act, but the said Supreme Court of Washington expressly refused to pass upon this question. With reference to this point, said Court says:

"Appellant further urges that the record shows that the respondent's (defendant in error) boom and location are not lawful in that no sufficient permit has been granted to it by the War Department of the United States. For reasons above stated, it is unnecessary that we shall examine that question." (Trans., p. 379.)

It will be seen, therefore, that the said Court expressly refused to consider the question of the right which this plaintiff is claiming was denied him, for the reason that it was immaterial because of the view it had taken of the relative rights of the two companies under the state law.

Furthermore, the plaintiff in error never set up or claimed in the state Court, a right under the statute which it is now attempting to claim under. Any question which was raised under that statute, to-wit, the River and Harbor Act, was raised by the defendant in error; but, as heretofore shown, the Court ruled that it was unnecessary to pass on that question, and based its decision on grounds of general law involving no Federal question whatever.

The original brief of the plaintiff in error in the Supreme Court of the state is not in the transcript, but the petition for rehearing filed by the plaintiff in error can be found at page 381 of the transcript, from which it will be noted that no mention whatever is made of any right under the River and Harbor Act, or the denial of any claim of plaintiff in error thereunder. The entire objection of the plaintiff in error to the decision of the Supreme Court of the State of Washington is set out in its petition for rehearing as follows (Trans., p. 381):

"The respondent respectfully petitions that a rehearing in this cause be granted, and that an oral

argument be permitted upon the merits of the cause, and submits in support thereof the following:

"1. The decision of this Court assumes that the Nicomen Boom Company intended at some future time to occupy and use the area in dispute. No issue of intention was in issue in the trial Court, and this respondent was denied the right to offer evidence in rebuttal of such alleged intention.

"2. The Court assumes that future necessity might require the use of the disputed area by the Nicomen Boom Company. No issue of future necessity was raised by the pleadings, nor was this respondent permitted to offer evidence thereon.

"3. The necessary result of the Court's decision is to authorize a monopoly by the first boom company platting navigable waters, and the boom statute so construed is void, because in violation of our constitutional provision against the granting of exclusive rights and the conferring of a monopoly.

"4. The legal effect of filing a boom plat should be determined by the constructions reasonably given to the boom statute, and not by resort to any supposed analogy between the filing of such a plat and the filing of a railroad plat of location.

"5. In any event the respondent has expended a large sum of money, at this time about $20,000, and the rights of every logger upon North River are seriously affected and jeopardized by the decision, which virtually excludes competition and prevents the respondent company from fulfilling its contractual obligations with the several persons and companies operating logging camps. Should the Court finally decide that the North Shore boom is an infringement upon the rights of the Nicomen

Company, permission is respectfully asked to stay the operation of a mandatory injunction so that condemnation proceedings can be maintained and the large amount of money invested be not lost, and thereby in addition securing to the public the rights of competition."

The argument of said petition for rehearing was confined to the points as above set out, and no mention whatever was made of any right under the United States statute. We submit, therefore, that the record discloses that no right under the Federal statute was set up or claimed by the plaintiff in error in the state Court, and hence this Court is without jurisdiction of the cause. The plaintiff in error cannot set up or claim such right in this Court for the first time.

The mere fact that the controversy arose out of a location in a navigable water of the United States would not necessarily raise a Federal question within section 709 of the Revised Statutes.

Egan v. Hart, 165 U. S. 188;
McMillan v. Ferrum Mining Co., 197 U. S. 347;
Telluride P. T. Co. v. Rio Grande W. R. Co., 175 U. S. 643.

This river lies entirely within the State of Washington, and it has been held by this Court in the case of

Cummings v. Chicago, 188 U. S. 431,

in interpreting Section 10 of the River and Harbor Act, that

"The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable

river, within the limits of a state, depend upon the concurrent or joint assent of both the National Government and the state government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the state acting by its constituted agencies."

This principle was again affirmed in the case of Montgomery v. Portland, 190 U. S. 103.

If a person desiring to erect a structure in a navigable water of the United States wholly within a state fails to get the authority or assent of the United States, through its proper officers, or fails to get the assent of the state, he is not entitled to build his structure. The question of whether or not a man has gotten the assent of the United States might present a Federal question, but the question of whether or not a person has secured the assent of the state is purely a question for the state to decide, and presents no Federal question. The decision of the Supreme Court of Washington sought to be reviewed decided only that the defendant in error had acquired the prior assent of the State of Washington to the locus in quo and therefore the plaintiff in error had not acquired the authority from the state to build; that is, it decided that plaintiff in error had not secured the assent of the state. If this Court should take jurisdiction in the case and decide that the plaintiff in error had the assent of the United States, it would not avail the plaintiff in error anything for the reason that the state has

denied its assent to the plaintiff in error, and, under the decision in the Cummings and Montgomery cases, above referred to, the assent of both is required.

The decision of the Court of Washington therefore on the non-Federal ground is sufficient upon which to base the judgment, because the denial of the state authority to build in the place in question, irrespective of any authority from the United States, prevents the building of a lawful structure there. We therefore contend that this writ of error should be dismissed, for the reason that no Federal question was involved or decided by the Court, and also that the Court's decision is based upon a non-Federal ground, and that that ground is sufficient to sustain the judgment.

II.

No citation, as required by law, has ever been served upon the defendant in error.

Section 999 of the Revised Statutes provides that

"When the writ is issued by the Supreme Court to a Circuit Court, the citation shall be signed by a judge of such Circuit Court, or by a Justice of the Supreme Court, and the adverse party shall have at least thirty days' notice, and when it is issued by the Supreme Court to a State Court, the citation shall be signed by the Chief Justice, Judge or Chancellor of such Court rendering the judgment or passing the decree complained of, or by a Justice of the Supreme Court of the United States, and the adverse party shall have at least thirty days' notice."

The purported citation on this writ of error is as follows:

UNITED STATES OF AMERICA—SS.

To the Nicomen Boom Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty (60) days from the date hereof, pursuant to a Writ of Error, filed in the Clerk's office of the Supreme Court of the United States of Washington, wherein State of Washington **ex rel.** North Shore Boom & Driving Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the thirteenth day of March, A. D. 1907.

(Seal of the United States Circuit Court, Western District of Washington.)

A. REEVES AYERS,
Clerk of the United States Circuit Court for the Western District of Washington.

(Trans., p. 398.)

This is the only purported citation that was ever served upon the defendant in error. There appears in the transcript, however, a copy of an additional citation (Trans., p. 311), which purports to have been signed by the Chief Justice of the Supreme Court of Washington on the 13th day of March; but this citation was never served upon the defendant in error, and was not filed in the Supreme Court until the 10th day of June, 1907, long after the return day of the writ.

The return of service on the first citation above quoted is shown on page 399 of the transcript, and there is absolutely no return of service on the second citation.

The statute of the United States above quoted expressly provides that this citation shall be signed by a Judge of the State Court, or a Judge of the United States Supreme Court. There is absolutely no authority for the same to be signed by the Clerk of the Court, and a citation so signed was no more than blank paper and had no effect of notice.

Furthermore, the purported citation directs the defendant in error to appear in a cause wherein the State of Washington **ex rel.** North Shore Boom & Driving Company is plaintiff in error and it is defendant in error. The plaintiff in error in this cause is the North Shore Boom & Driving Company, and not the State of Washington on the relation of the North Shore Boom & Driving Company. There was, however, a cause in the Supreme Court of the State of Washington entitled, "State of Washington **ex rel.** North Shore Boom & Driving Company versus Nicomen Boom Company." That was a cause commenced by the North Shore Boom & Driving Company to condemn the property of the Nicomen Boom Company, and was commenced subsequently to the decision of the Supreme Court of Washington in the present case, and is the proceeding referred to in subdivision 5 of the petition for rehearing, where the North Shore Boom & Driving Company prays the Court to stay the operation of the mandatory injunction pending a condemnation proceeding.

Such a condemnation proceeding was commenced by the North Shore Boom & Driving Com-

pany, and was decided in the Superior Court adversely to the North Shore Boom & Driving Company, and was taken by writ of review from the Superior Court of the State of Washington to the Supreme Court of the State, and the writ of review was dismissed in the Supreme Court of the state. The decision in that case will be found in 89 Pac. Rep. at page 479. So that, the purported citation not only was improperly signed, but it did not cite the defendant in error to appear in the present cause, but cited it to appear in an entirely different proceeding, to-wit, the condemnation proceeding.

We therefore submit that the citation issued in this cause was entirely insufficient to bring the Nicomen Boom Company into Court.

We therefore respectfully submit that the writ of error in this case should be dismissed and the defendant in error go hence without day.

Respectfully submitted.

W. W. COTTON,
WELSH & WELSH, and
JAMES G. WILSON,
Attorneys for Defendant in Error.

No. 20762.

IN

The Supreme Court of the United States

OCTOBER TERM, 1908.

No. 107.

NORTH SHORE BOOM & DRIVING COMPANY,
Plaintiff in Error,

v.

NICOMEN BOOM COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of Washington.

Brief of Defendant in Error

This suit was commenced by the defendant in error in the Superior Court of the State of Washington for Pacific County, to enjoin the plaintiff in error from building a boom in North River, in the State of Wash-

ington, within the portion of said river included within the location made by the defendant in error, under the statute of the State of Washington relating to the construction of logging booms in the navigable waters of the State.

By a State statute, boom companies in Washington are, as stated in the opinion of the court below, quasi public corporations, having the power of eminent domain, required by law to file a map of location and to perform services for all persons requesting the same. (Trans., p. 374.)

The statute upon the subject is found in sections 4378 to 4394, Ballinger's Code and Laws of the State of Washington, and is printed herein as an appendix to this brief.

By section 4379 of the statute, any corporation seeking the benefit of the Act, must, within ninety days after its articles of incorporation have been filed, proceed to file in the office of the Secretary of State a plat of the survey of so much of the shore lines of the waters of the State, and lands contiguous thereto, as are proposed to be appropriated by the corporation.

Both the plaintiff in error and the defendant in error are boom companies which sought to obtain the benefit of the statute, for the purpose of constructing booms in North River. The following statement, taken from the opinion of the court below (Trans., p. 372), shows what each of the companies had undertaken to do to acquire such rights, and the situation of their respective booms, and the effect which the boom of the plaintiff in error had upon the boom of the defendant in error:

"Both companies are organized under the laws of this state which authorize the organization of corporations for the purpose of catching, booming, sorting, rafting and holding logs, lumber or other timber products. In April, 1900, being in due time after the organization of the plaintiff company, it caused to be filed in the office of the Secretary of State of the State of Washington, its plat and survey, showing so much of the shore lines and waters of North River and lands contiguous thereto as it proposed to appropriate under the laws of this state. Before beginning the construction of its boom, it sub-

mitted to the Secretary of War of the United States a plan of its proposed improvements and a plat of the territory to be occupied thereby, and was by said war department granted permission to construct a boom within the limits of said river covered by said plat of location. The territory designated by said plat of location embraces the shores of North River, which river is tributary to Willapa Harbor, a bay leading into the Pacific Ocean, and the territory extends from near the mouth of the river on both sides for some distance up the stream. The plaintiff thereupon acquired by purchase such upland and shore land on the left side of said river, reckoning down stream as was necessary for its use in the premises, and promptly proceeded to erect boom works along the left side of the river, but stopped short of the upper end of the territory covered by its plat of location. The boom was substantially constructed at a cost of about $16,000, and from the time of its erection until this controversy arose it was constantly operated as originally constructed. While the plaintiff has done some work above, yet its boom has never been completed beyond its rudder sheer as originally built. The plaintiff has, however, always expected to extend the boom within the limits of said plat of location as the demands of business might require, and some weeks before the commencement of this action it had ordered piling for the purpose of extending its boom as originally constructed about one thousand feet further up the river. Through some delay, for which plaintiff was not responsible, it did not have this piling upon the ground, and therefore did not commence the actual work of extending the boom until some days after the defendant had commenced to construct its boom as hereinafter mentioned. It was estimated by the plaintiff that the output of logs on North River for the season next following would be largely in excess of the output for the previous year, and that in such case the enlargement of its boom would be necessary for the purpose of receiving and handling such increased output. About this time, in August, 1903, the defendant company was organized, and it also filed its plat and survey in the office of the Secretary of State, showing so much of the water and shore lines of North River and land contiguous thereto as it

proposed to appropriate for its boom and driving purposes. It also claims that before commencing to construct its boom, it secured from the war department of the United States permission to construct within its said location. The plat of location filed by the defendant in the office of the Secretary of State covered substantially the part of the territory embraced in the plat of the plaintiff lying above the upper end of the sheer boom constructed by plaintiff as aforesaid. The defendant then proceeded to acquire uplands and tide lands within its plat of location, on the right side of the river, considered necessary for its use in the operation of its proposed boom, such lands being on the bank opposite to the side of the river occupied by the plaintiff's boom as constructed. On September 4, 1903, the defendant began the driving of piles for the construction of its boom, and erected a line of dolphins within the limits of both of said plats of location. Thereupon this action was brought. An emergency restraining order was issued, and afterwards, upon notice, a temporary injunction was granted pending final hearing of the action. It appears that the indemnity bond required by the court under the last named injunctional order was not given by plaintiff, and thereupon the defendant continued with its work of construction. At the time of the trial, the defendant had substantially completed the construction of its proposed boom. The boom of the defendant is so constructed that logs coming down the river intended to reach the plaintiff's boom will necessarily enter the main boom of the defendant. The booms as proposed by the plaintiff and defendant cannot both be constructed. If the boom of the plaintiff should be extended up the river, the passage between its line of dolphins and the dolphins of the defendant on the other side of the stream would be so narrow as to block navigation. Moreover, it would be impracticable to operate both booms under such circumstances. If the defendant is permitted to operate its boom as constructed, the boom of the plaintiff will receive only such timber from up the river as may escape from the boom of defendant and such as may be transmitted through that boom to the plaintiff. The foregoing facts are practically undisputed in the case, as we are advised by the

record and the findings of the court and by such exceptions as were taken to the findings."

As indicated in the opinion of the court below (Transcript, page 373), the questions passed upon by the Superior Court and the Supreme Court, related solely to the construction and effect of the state boom statute. The Superior Court, as shown by its opinion (Transcript, page 269, 274-275), reached the conclusion that section 4378 of the statute had the effect of forfeiting the rights of the defendant in error to all that portion of its location not included within its boom. The Supreme Court of the State, as shown by its opinion, places a different construction upon the statute, and held that the defendant in error had lost none of its rights to that portion of the stream included within its location, and that therefore the plaintiff in error must be enjoined from occupying any portion of the river covered by the location filed by the defendant in error. The questions, therefore, decided by the Superior Court and by the Supreme Court of Washington were questions which related to the construction and effect of the statute of the State, and on familiar principles this court will follow the construction placed upon the statute by the Supreme Court.

As appears from the quotation which has been made from the opinion of the court below (Transcript, pages 372, 373), the defendant in error submitted to the Secretary of War of the United States a plan of its proposed improvements and a plat of the territory to be occupied thereby, and was by the war department granted permission to construct a boom within the limits of the river covered by said plat of location. This permission is set out at page 357 of the Transcript, and is referred to in Finding of Fact 3 of the Superior Court (Transcript, page 311). This permission is dated the 14th day of April, 1900. (Plaintiff's Exhibit B, Transcript page 357.) Finding of Fact 7 made by the Superior Court (Transcript, page 312), is as follows:

"That prior to the commencement of this action the defendant applied to the secretary of war for permission to build a boom within the limits of its said plat of location, and that in response thereto it received from the

secretary of war the following and *on* (no) other permission, to-wit:

"B. O. United States Engineer Office.
"Seattle, Washington, March 23, 1903.
"Mr. John F. Hobi, South Bend, Wash.

"Dear Sir—Referring to your application of February 7, 1903, for permission to construct and maintain a boom for storage of logs in North River, Pacific County, Wash., the Secretary of War directs that you be informed 'that the war department will interpose no objection to its construction and maintenance in the manner proposed, so long as it does not unreasonably interfere with navigation.'

"By direction and in the absence of Major Millis.
"Very respectfully,
"JAMES H. MURPHY, Chief Clerk."

This finding is referred to in the opinion of the court below (Transcript, page 373) in the following language, the word "it" referring to the plaintiff in error: "It also claims that before commencing to construct its boom it secured from the war department of the United States permission to construct within its said location."

The court below, reversing the judgment of the Superior Court, ordered that the boom operations of the plaintiff in error must be restricted to the territory outside of the location of the defendant in error. (Opinion, Transcript, page 380.)

Ten errors are claimed to have been committed by the court below. (Assignment of Errors, Transcript, page 405.) Of these errors, the first, second, third and tenth only present any question possibly relating to any denial of any right claimed under the laws or the Constitution of the United States. These errors are the following:

1. The court erred in not finding and deciding that plaintiff in error had a good and valid permission from the Secretary of War to construct its said boom.

2. The court erred in finding and deciding that the defendant in error had a good and valid permission from the Secretary of War to hold the territory occupied

by the boom of plaintiff in error for its contingent future necessities.

3. The court erred in not finding and deciding that the permit and license granted by the Secretary of War to plaintiff in error to construct its said boom operated as, and was, a revocation of the permit and license previously granted by the Secretary of War to construct its said boom.

10. The court erred in giving and entering judgment impairing and violating the rights of the plaintiff in error under the Fourteenth Amendment of the Constitution of the United States.

No error was committed by the court below for the following reasons:

1. The question of federal right sought to be reviewed by this court was not raised by the pleadings or ever presented to or decided by either of the state courts.

2. If such question of federal right had been presented to the state courts, such question would not have affected the result.

ARGUMENT

I.

In Answer to Brief of Plaintiff in Error on the Jurisdictional Question.

The defendant in error heretofore moved to dismiss this writ of error, and filed a brief thereon, which motion was set for Monday, January 20, 1908, at which time the same was submitted, and the court reserved its decision until the argument on the merits. Since then, the plaintiff in error has served a brief, both on the motion and on the merits. In this brief plaintiff in error states that it heretofore submitted a brief on the motion to dismiss the writ of error, but no such brief has ever been served upon the defendant in error, and we know of no such brief.

The plaintiff in error has, in its brief, discussed abstract questions of law without regard to the record in the case. Our motion to dismiss the writ of error was based upon the ground, among others, as follows:

"Third. That no title, right, privilege or immunity was claimed by the plaintiff in error in said Supreme Court of the State of Washington under the Constitution, or any treaty, or any statute, or any commission held, or authority exercised, under the United States, nor was said decree or judgment a decision against any title, right, privilege or immunity specially set up or claimed by the plaintiff in error under the Constitution, or any treaty, statute, commission, or authority of the United States."

"Sixth. That no question attempted to be presented to this court by the plaintiff in error in order to sustain the writ of error herein was specially set up or claimed or drawn in question by the said plaintiff in error, in any court in the State of Washington, and that no such question was considered or passed upon by the said State court.

"Seventh. That the decision of the Supreme Court of the State of Washington was not against any right, privilege or immunity specially set up or claimed by the plaintiff in error under the Constitution, or any treaty,

or statute, or commission, or authority of the United States."

The plaintiff in error does not, in any part of its brief, point out in the record where any right, under the statutes of the United States it is now attempting to invoke, was claimed by it in the State court, or passed upon by the State court, and, as a matter of fact, throughout the entire record in the case, the plaintiff in error attempted to show that North River was not a navigable water of the United States within the terms of the River and Harbor Act; that said river was so shallow as to be a negligible quantity, so far as crafts navigating the same were concerned, and that the only practicable navigation of the stream was for logs in the freshet season.

It was the contention of the defendant in error throughout, that the stream was a navigable water of the United States, and hence both parties to the controversy were required to obtain a permit from the war department on plans authorized by the chief of engineers, in accordance with the River and Harbor Act.

The defendant in error further contended that the alleged permit of the plaintiff in error was not a sufficient permit under the River and Harbor Act, but the courts refused to pass upon this contention, basing their decisions entirely upon the construction of the State law, as will be pointed out later in this brief.

The contention of the plaintiff in error as to the immateriality of the rights under the United States River and Harbor Act, was so strongly made by the plaintiff in error in the State court, that it was reflected in the original opinion filed by the judge of the Superior Court in his decision of the case. The judge said (Transcript, page 269):

"The question raised by the pleadings and the brief call for a construction of the laws of the State relative to boom companies."

And again, at page 270:

"The plaintiff (defendant in error) before beginning any work, also submitted to the secretary of war the plan of its proposed improvements and a plat of the territory to be occupied thereby, and was granted a permit

by the war department to construct the boom within the limits of the whole territory covered by this litigation. The defendant (plaintiff in error) also submitted to the war department a somewhat indefinite and informal plat of its intended improvements in the river, and claims to have been authorized by the department to proceed therewith, which claim is disputed by the plaintiff. The proof on this subject is not clear, *but in my opinion the question is immaterial in passing upon the rights here involved.* The laws of the State do not require such a permit to be obtained, and the application to the war department is only made for the purpose of satisfying it that the interests of navigation will not be prejudiced by the proposed improvements. I think a boom company, organized under the laws of the State, could erect its works in the river without reference to the war department, provided the navigability of the river was not unreasonably obstructed thereby."

Again, at page 276, the court says:

"Without taking up the question as to the right of plaintiff to apply for an abatement of any nuisance that is common to the public, the facts in this case, in my opinion, do not show any disregard of this statute by the defendant. It is undoubtedly true that North River is a meandered and navigable stream, both above and below the lines of the disputed territory. The tide rises and falls for a distance of a mile or more above the uppermost end thereof. *But the portion of the river above the boom of defendant (plaintiff in error) is not navigable in the ordinary sense at low tide.* The navigability of the river is occasioned chiefly by the flooding of the tide. In the dry season the portion of the river not affected by the tide is not navigable within the contemplation of the law. In such seasons logs cannot be floated down that part of the stream. They can only be brought to the tide water through the swelling of the stream caused by occasional freshets. Still, the river is navigable at ordinary high tide, within the tidal section, by such vessels as ordinarily have occasion to ply thereon. *Yet, as a matter of fact, the chief use of the stream is for the floating of logs cut from the upper shores.* Not more

than a dozen settlers live along the banks of the river, and their customary transportation is furnished by canoes and rowboats. * * *"

The same matters are reflected in Finding of Fact No. 13 of the Superior Court. (Trans., p. 314.)

Furthermore, the plaintiff in error did not set up any right or title in itself. The right, as set forth in the complaint, is based entirely upon the title of the defendant in error. The plaintiff in error, in its answer, simply contents itself with denying the title of the defendant in error, as set up in its complaint. It nowhere raised the question of any right under the United States statute, but its contention throughout the State court was to the effect that the entire rights of the parties were determined by the State law, and not by any Federal law.

In the brief of plaintiff in error, filed in the State Supreme Court, and on which the judgment of the Supreme Court was based, the plaintiff in error's counsel says:

"The *appellant* (i. e., the defendant in error) lays the greatest stress upon the position that the respondent had no lawful right to erect its boom, resting its contention solely on the form of the assent of the national authorities.

"It will be borne in mind at the outset, that the United States government has not complained; that this is not an action to abate a public nuisance; that there is no claim that the respondent's structure interferes with the navigability of North River, at which the United States statute is aimed; that there is no claim that the respondent has acted in defiance of the United States authorities and did not have, at least, the colorable assent of the Secretary of War to erect its boom; but this action is, in legal contemplation, *simply an action to try title to the premises in dispute.*

"The three cases mainly relied upon, U. S. v. R. G. Irrigation Co., 174 U. S. 690; Cummings v. Chicago, 188 U. S. 410, and Montgomery v. Portland, 190 U. S. 89, *are not analogous,* for the reason that the moving party in each case was the sovereign itself, in the first moving directly and in the others through power delegated by it to municipal corporations; and in the Wash-

ington cases cited, the actions were to abate public nuisances.

"If a United States statute has been violated, or the Federal assent has not been, in fact, given, only the Federal government can complain.

Manuel v. Wulff, 152 U. S. 505;
McKinley C. Min. Co. v. A. U. M. Co., 183 U. S. 563.

"The latter is especially in point. The mining statutes of the United States require that the locator of a mining claim shall be a citizen of the United States, or have declared his intention to become such. There was no evidence that the locators of the mining claim in question were citizens of the United States, and it was claimed, therefore, that the location was not valid, *just as, in this case, it is claimed that the respondent's structure cannot be lawful, because a U. S. statute requiring the permission of the Secretary of War has been only colorably complied with.* * * *

"In the case at bar, the filing of the map and survey and taking possession of and enclosing the unoccupied waters of the State, constituted a valid appropriation. *The assent of the war department is but a mere incident to the possession and cannot be questioned by private parties whom it does not concern.*"

Here it will be seen that the defendant in error in this court was in the State court pressing the plaintiff in error on the question of its right under the United States law, but that the plaintiff in error in the State court not only did not make any claim under that statute, or rely upon any right under that statute, but was continually fighting shy of that question, and saying to the State courts: "You have no right to go into the question of our compliance with the United States statute; that question can only arise between myself and the Government of the United States;" and the State courts, pursuant to this strenuous objection on the part of the plaintiff in error to the State courts considering their rights under the United States statute, refused to pass upon that question, and defeated the plaintiff in error purely and simply upon the local State statute of Washington with regard to

boom companies. But then, when the plaintiff in error was defeated, irrespective of its rights under the United States statute, and on the grounds of controversy insisted upon by itself, its only hope lay in a writ of error to this court. But this court has repeatedly held that, in order to give this court jurisdiction, the question of the right or title claimed by the plaintiff in error under a United States statute, must have been specially set up, and the attention of the State courts specifically directed to the same in such a manner that the State court, at the time it passed upon the question, must know that the plaintiff in error was intending to, and was relying upon some right or title under a United States statute. But a plaintiff in error cannot shoo off the State courts from the question and then, when the decision is against it, come into this court and present the question for the first time. This has been repeatedly held by this court. In the case of Oxley Stave Co. v. Butler County, 166 U. S. 648, this court reviewed the question at considerable length, and, on page 653, says:

"Looking into the record we do not find that any reference was made in the court of original jurisdiction to the Constitution of the United States. Nor can it be inferred from the opinion of the Supreme Court of Missouri that that court was informed by the contention of the parties that any Federal right, privilege or immunity was intended to be asserted. For aught that appears the State court proceeded in its determination of the cause without any thought that it was expected to decide a Federal question."

And again, at page 654, the court says:

"Do such general allegations meet the statutory requirement that the final judgment of a state court may be re-examined here if it denies some title, right, privilege or immunity 'specially set up or claimed' under the Constitution or authority of the United States? We think not. * * * But can it be said that the plaintiffs *specially* set up or claimed the protection of that amendment against the operation of that decree by simply averring—without referring to the Constitution or even adopting its phraseology—that the decree was passed

against deceased persons as well in the absence of necessary or indispensable parties?

"The question must receive a negative answer, if due effect be given to the words 'specially set up or claimed' in section 709 of the Revised Statutes. These words were in the twenty-fifth section of the Judiciary Act of 1789 (1 Stat. 85), and were inserted in order that the revisory power of this court should not extend to rights denied by the final judgment of the highest court of a State, *unless the party claiming such rights plainly and distinctly indicated, before the State court disposed of the case, that they were claimed under the Constitution, treaties or statutes of the United States.* The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference."

To the same effect see:

Hulbert v. Chicago, 202 U. S. 279;
Marvin v. Trout, 199 U. S. 212, 223;
Osborne v. Clark, 204 U. S. 567;
Erie R. R. Co. v. Purdy, 185 U. S. 151.

In the present case the plaintiff in error cannot, throughout the State courts, induce those courts to decline to pass upon a Federal question, which was raised, not by itself, but by its opponent, and then, when it is defeated finally in the State courts, come in and claim that its rights under a Federal statute were denied it by the State courts, when it nowhere in those courts gave any intimation that it was claiming, or intended to rely upon any such rights, and without securing a determination of such rights.

The plaintiff in error, in its brief, has exhausted considerable space in the discussion of these questions, but it nowhere points out in the record where it ever secured

a ruling of the court on the claim it is now attempting to assert under the United States statute, or even brought that to the attention of the Court.

Furthermore, the plaintiff in error throughout this case admits that this controversy is, in legal contemplation, an action to try title to the premises in dispute. In such actions in the State of Washington, it is provided that the plaintiff in his complaint must set up in his complaint, the grounds on which his title is based, and the nature thereof; and the defendant may set up a legal or equitable defense to the plaintiff's claim, and the superior title shall prevail. Section 5508 of Ballinger's Codes and Statutes of Washington, provides as follows:

"The plaintiff in such action shall set forth in his complaint the nature of his estate, claim or title to the property, and the defendant may set up a legal or equitable defense to plaintiff's claims and the superior title, whether legal or equitable, shall prevail. The property shall be described with such certainty as to enable the possession thereof to be delivered, if a recovery be had."

And section 5509 of Ballinger's Code and Statutes of Washington provides:

"The defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer. If so pleaded, the nature and duration of such estate or license or right to the possession shall be set forth with the certainty and particularity required in a complaint. * * *"

By a reference to the complaint (Trans., p. 287) it will be seen that the defendant in error (plaintiff in the Superior Court of Washington), sets forth its own title and the nature thereof to the *locus in quo*. The plaintiff then alleges that defendant (plaintiff in error here) was incorporated in August, 1903, and that it purported to file in the office of the Secretary of State of Washington an instrument purporting to be a plat of survey of its proposed boom in Pacific County, in accordance with the boom laws of the State of Washington, but that said plat was insufficient under the State law, and further shows that the plaintiff in error was placing structures

in the location of the defendant in error, and asks that the plaintiff in error be enjoined. No mention is made in said complaint of any compliance by the plaintiff in error, or any claim of the plaintiff in error, set up under the River and Harbor Act, or any permit from the Secretary of War to the plaintiff in error. Thereafter, the defendant (plaintiff in error here) answered. (Trans., p. 297.) Said answer was simply a denial of certain portions of the plaintiff's complaint, and did not set up any right or title under the United States statute, under which it is now claiming.

Thereafter, the defendant in error filed a supplemental complaint (Trans., p. 301), setting up the construction of the plaintiff in error's boom since the commencement of the action, and asked that the boom be removed.

In the answer of the plaintiff in error to this supplemental complaint (Trans., p. 302), the plaintiff in error did not even then set up any right or title under the United States River and Harbor Act or a permit from the Secretary of War.

Under such circumstances, we submit, that the plaintiff in error, under the statutes of Washington above pointed out, did not properly raise the question in the State court, as required by the laws of that State, because it is specifically provided that unless such estate or right is set up in the answer, the defendant shall not be allowed to give in evidence any estate in himself or another in the property. Under such circumstances the State court certainly would not, and could not, know that any such title or right was being, or was intended to be, relied upon by the plaintiff in error, and, as a matter of fact, no such title was relied upon or claimed. As has been heretofore shown, the plaintiff in error avoided that question throughout.

The plaintiff in error, in its brief, argues that the court must necessarily have passed on the right under the Federal statute in passing upon the case. At page 21 of their brief, the counsel say:

"The Washington Supreme Court held that the filing of the boom plat was analogous to the filing of a plat

for the right of way of a railroad corporation, which would hold the location until actual abandonment, and therefore the defendant in error had the State assent, and that the plaintiff in error could not have such assent. *This was the sole question in the case as decided by the Supreme Court of the State of Washington,* and from its very nature could only be a Federal question."

We agree that the only question decided in the State court was that the defendant in error had the State assent to the building of its boom, and that the plaintiff in error had not such assent, and that therefore the question of whether or not the plaintiff in error had a permit from the Secretary of War, or whether or not the purported permit was a valid one or not, was absolutely immaterial, as we will point out in the latter part of this brief. It has been repeatedly held by this court that such a question is a matter of local law which can be more properly left to the local State authorities than to the Federal Government, and that such question does not present a Federal question; that the denial of the State assent to the plaintiff in error is not a denial of a right claimed under a Federal statute.

On page 23 of brief of plaintiff in error, counsel says: "The decree vests the defendant in error with a monopoly upon one of the most important highways on the Pacific Coast, and is in violation of the Fourteenth Amendment to the Constitution of the United States.

"That the decree violated this amendment to the Constitution of the United States in this respect was specifically urged in the petition for rehearing and was denied by the court, and thus a second Federal question was raised."

The petition for rehearing will be found on page 381 of the Transcript, and we particularly call the court's attention to the fact that no such question was presented as above stated by counsel. The only reference to a violation of a constitution is that in paragraph 3 (Trans., p. 382), as follows:

"The necessary result of the court's decision is to authorize a monopoly by the first boom company platting navigable waters, and the boom statute so construed is

void because in violation of *our* constitutional provision against the granting of exclusive rights and the conferring of a monopoly." The counsel here referred to the constitution of the State of Washington, as is shown by the argument on the petition for rehearing (Trans., p. 385), and the Supreme Court of the State passed upon that question with reference to the State constitution. (Trans., pp. 379, 380.) The provision of the State constitution referred to is Art. XII, Sec. 22, as follows: "Monopolies and trusts shall never be allowed in this state. * * *"

The State Supreme Court passed upon the question with reference to the State constitution, and held the location of defendant in error valid as against such objection. This court willl follow the State court decisions in questions of local law and constitution, authorities for which we will cite in the latter part of this brief. It is ridiculous to say that the question of violation of the Fourteenth Amendment was presented in the petition for rehearing. That amendment has no reference to any matter presented in said petition.

Erie R. R. Co. v. Purdy, 185 U. S. 150;
Osborne v. Clark, 204 U. S. 567.

Furthermore, the court on petition for rehearing did not grant the same or reconsider the question, but denied the petition without opinion. No rehearing was ever granted or had and a Federal question raised in that petition is too late. This court has declined to take jurisdiction when the first mention of the point is made in a petition for rehearing in the State court.

Capital Bank v. Codiz Dank, 172 U. S. 431;
Weber v. Rogan, 188 U. S. 10;
Barrington v. Mo., 205 U. S. 483;
Mutual L. Ins. Co. v. McGrew, 180 U. S. 87;
Turner v. Richardson, 180 U. S. 87.

The burden is on the plaintiff in error to show that the question was properly raised and passed on.

Chicago, Etc. Ry. Co. v. McGuire, 196 U. S. 132;
Fowler v. Lansen, 164 U. S. 252.

Plaintiff in error has failed to sustain such burden.

II.

On the Merits

In the present case the State Supreme Court, construing the State boom statute, has held that the defendant in error has the authority of the State to construct a boom within the limits of the location filed by the defendant in error under such State statute, and that the plaintiff in error has no authority from the state to construct any boom within that part of the North River included within the location of the defendant in error. Upon this point, it is said in the opinion of the court below (Transcript, page 380): "The court finds that the appellant's attempted extension cannot be made and operated by reason of the respondent's boom. The two cannot exist together. It follows that the respondent is unwarrantably interfering with appellant's location, and that in its booming operations the former must be restricted to territory outside of the latter's location."

This construction by the State court of the State statute and of the authority attempted to be exercised thereunder by the defendant in error will, on familiar principles, be followed by this court.

W. W. Cargill & Co. v. Minn., 180 U. S. 466;
Tullis v. Lake Erie & Western R. R. Co., 175 U. S. 353;
Missouri Pacific v. Nebraska, 164 U. S. 414;
N. Y. Central R. R. Co. v. Miller, 202 U. S. 595;
Soper v. Lawrence Bros., 201 U. S. 370, 371;
Tampa Water Works v. Tampa, 199 U. S. 243;
Gatewood v. North Carolina, 27 Sup. Ct. Rep. (U. S.) 170;
Rasmussen v. Idaho, 181 U. S. 200;
Yazoo & Miss. R. R. Co. v. Adams, 181 U. S. 583.

The effect of the decision of the court below is that the plaintiff in error has no right or authority from the State of Washington to construct a boom within any part of the river covered by the location of the defendant in error. Having no right from the State to erect a

boom, no permission or authority from the Secretary of War could confer any right upon the defendant in error.

Prior to the enactment of the River and Harbor Acts, the first of which was in 1890, this court held that the authority of the State to authorize structures in navigable waters wholly within the State is plenary, and that such State authority must necessarily be obtained before any lawful structure could be constructed in such waters. The decisions of this court rendered since the passage of the River and Harbor Act clearly show that no congressional action has been taken affecting in any way whatsoever the authority of the State to authorize structures in such navigable waters save and except to the extent that the person receiving State authority to erect such constructions must before exercising such authority submit plans of the proposed structure to the Secretary of War and obtain his consent to its erection; that the Secretary of War has no power to affirmatively authorize the erection of any structure in the navigable waters of the State without the consent of the State; and that a person who has not obtained the assent of the State and who is undertaking to exercise a permission of the Secretary of War to erect an obstruction in navigable waters, is erecting and maintaining a nuisance and may be enjoined by the State authorities or by any person injured or affected thereby.

The state of the law prior to the passage of the River and Harbor Acts above referred to is stated in the following cases:

Escanaba Co. v. Chicago, 107 U. S. 683;
Lake Shore & Mich. Ry. Co. v. Ohio, 165 U. S. 386;
Cummings v. Chicago, 188 U. S. 427;
Montgomery v. Portland, 190 U. S. 105.

In Escanaba Co. v. Chicago, 107 U. S. 683, it is said:

"The states have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people. This power embraces the construction of roads, canals and bridges,

and the establishment of ferries, and it can generally be exercised more wisely by the state than by a distant authority. They are the first to see the importance of such means of internal communication and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago river and its branches than any other state, and is more directly concerned for the prosperity of the city of Chicago, for the convenience and comfort of its inhabitants and the growth of its commerce, and nowhere could the power to control the bridges in that state, their construction, form and strength and the size of their draws and the manner and times of using them, be better vested than with the state or the authorities of the city upon whom does devolve that duty; when its power is exercised so as to unnecessarily obstruct the navigation of the river or its bridges, congress may interfere and remove the obstruction; if the power of the state and that of the federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the constitution to legislation in pursuance of it as the supreme law of the land, *but until congress acts on the subject, the power of the state over bridges across its navigable streams is plenary.* This doctrine has been recognized from the earliest period and approved in repeated cases."

And again, at page 687: "Bridges over navigable streams which are entirely within the limits of a state are of the latter class. The local authority can better appreciate their necessity and can better direct the manner in which they shall be used and regulated than the government at a distance. It is, therefore, a matter of good sense and practical wisdom to leave their control and management with the states, congress having power at all times to interfere and supersede their authority whenever they act arbitrarily and to the injury of commerce."

In Cummings v. Chicago, 188 U. S. 427, the above case is quoted with approval on the foregoing point. See also on this point, Lake Shore & Michigan Ry. Co. v. Ohio, 165 U. S. 366, and Montgomery v. Portland, 190 U. S. 105.

Section 10 of the River and Harbor Act of 1899, volume 6, Federal Stat., Ann., page 813, is now in force and reads as follows:

"That the creation of any obstruction not affirmatively authorized by congress to the navigable capacity of any of the waters of the United States is hereby prohibited, and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures in any port, roadstead, haven, harbor, canal, navigable river or other water of the United States outside of established harbor lines or where no harbor lines have been established, except on plans recommended by the chief of engineers and authorized by the Secretary of War."

The law as it now exists is stated and applied in the following cases:

Lake Shore & Mich. Ry. v. Chicago, 165 U. S. 366;
Cummings v. Chicago, 188 U. S. 427;
Montgomery v. Portland, 190 U. S. 105.

In the case of Lake Shore & Michigan Ry. Co. v. Ohio, 165 U. S. 365, the question as to how far this right of the states to authorize and control obstructions in navigable waters in the United States wholly within their territorial limits, was superseded by the River and Harbor Act of September 19, 1890, the provisions of which are similar to the River and Harbor Act of 1899, was considered. The court, at page 368, says:

"Conceding without deciding that the words 'waterways of the United States,' therein used, applied to all navigable waters even though they be wholly situated within the state, and passing also without deciding the contention that congress can lawfully delegate to the secretary of war all its powers to authorize structures of every kind over all navigable waters, nothing in the statute gives rise even to the implication that it was intended to confer such power on the Secretary of War. *The mere delegation to the secretary of the right to deter-*

mine whether a structure authorized by law has been so built as to impede commerce and to direct when reasonably necessary, its modification so as to remove such impediment, *does not confer upon that officer power to give original authority to build bridges, nor does it presuppose that congress conceived that it was lodging in the secretary power to that end.*

"When the distinction between the authorized structure so erected as to impede commerce and the unauthorized work of the same character is borne in mind, the fallacy of the contention relied on becomes apparent. The mere delegation of power to direct and change any lawful structures so as to cause them not to interfere with commerce, cannot be construed as conferring on the officer named the right to determine when and where a bridge may be built. If the interpretations claimed were to be given to the act, its necessary effect would be that congress in creating an additional means to control bridges erected by authority of law, had by implication confirmed and made valid every bridge built without sanction of law."

This foregoing language was quoted with approval and followed in the case of Cummings v. Chicago, 188 U. S. 428, with reference to section 10 of the Act of 1899, now in force.

In the Cummings case, *supra,* the appellants had secured from the secretary of war a permit to construct, in the State of Illinois, a dock, on certain plans submitted. The officers of the City of Chicago refused to give a permit for the construction of the dock, and the appellants proceeded, without any authority from the State of Illinois, to construct the dock. The question involved was whether or not the United States, by the River and Harbor Act of 1899, had assumed entire control of the Calumet river, a navigable stream lying wholly within the State of Illinois, and consequently whether or not a permit from the Secretary of War, under the River and Harbor Act, was sufficient authority to enable the appellants to construct their dock without reference to the city or state authorities. The court held that the authority of the Secretary of War was not sufficient. At

page 430 of the opinion, the court refers to the decision in Lake Shore & Michigan Railway v. Ohio, and says:

"The decision in Lake Shore & Michigan Ry. v. Ohio, was rendered before the passage of the River and Harbor Act of 1899, but the tenth section of that act, upon which the permit of the secretary of war was based, is not so worded as to compel the conclusion that congress intended by that section to ignore the wishes of Illinois in respect to structures in navigable waters that are wholly within its limits. We may assume that congress was not unaware of the decision of the above case in 1896, and of the interpretation placed upon existing legislative enactments. If it had intended by the act of 1899 to assert the power to take under national control for every purpose and to the fullest possible extent the erection of structures in the navigable waters of the United States that were wholly within the limits of the respective states, and to supersede entirely the authority which the states in the absence of any action by congress have in such matters, such a radical departure from the previous policy of the government would have been manifest by clear and explicit language. In the absence of such language it should not be assumed that any such departure was intended."

In reference to the act of 1899, the court, on page 427, says: "But congress has not passed any act under which parties having simply the consent of the secretary may erect structures in Calumet river without reference to the wishes of the State of Illinois on the subject."

After reviewing the former decisions of this court with reference to prior River and Harbor Acts and the rule applicable prior to the enactment of any law by congress with reference to the placing of structures in navigable waters, the court, at page 430, says: "We will not at this time make any declaration of opinion as to the full scope of this power (that is, power to regulate commerce under United States Constitution) or as to the extent to which congress may go in the matter of the erection or authorizing the erection of docks and like structures in navigable waters that are entirely within the

territorial limits of the several states, whether congress may, against or without the expressed will of a state, give affirmative authority to private parties to erect structures in such waters, it is not necessary in this case to decide; it is only necessary to say that the act of 1899 does not manifest the purpose of congress to go to that extent under the power to regulate foreign and interstate commerce, *and thereby to supersede the original authority of the states.* The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river within the limits of a state, depend upon the concurrent or joint assent of both the national government and the state government. The Secretary of War, acting under the authority conferred by congress, may assent to the erection by private parties of such a structure; without such assent the structure cannot be erected by them; but under existing legislation they must, before proceeding under such an authority, obtain also the assent of the state acting by its constituted agencies."

The decision in the Cummings case was quoted in the case of Montgomery v. Portland, 190 U. S. 89. In that case Montgomery was authorized by an order of the Secretary of War to extend a wharf to a relocated harbor line established by the Secretary of War within the limits of the city of Portland. The city authorities of Portland, having jurisdiction under the state, sought and obtained an injunction from the Supreme Court of Oregon, restraining the construction of the dock. From this judgment a writ of error was taken to this court and the judgment was affirmed. In the opinion the Cummings case is cited with approval at pages 103 and 106, and at page 107 the court says:

"It is sufficient now to say that the legislation upon which the defendant relies to justify the construction of the works in question, does not, when reasonably interpreted, indicate any purpose upon the part of congress to assume such complete and absolute control of the navigable waters of the United States as will make of no avail the action of the state in respect of the erection by private parties of structures in waters wholly within their respective limits."

See also

Manigault v. Springs, 199 U. S. 473,

in which the cases are again reviewed, and the court, at page 479, says:

"In Lake Shore, Etc. R. R. Co. v. Ohio, 165 U. S. 365, it was held that the act of September 19, 1890, conferring upon the Secretary of War the authority to direct the alteration of such bridges, so as to render navigation easy and unobstructed, did not deprive the states of authority to bridge such streams.

"While all of these cases turned upon the power of the state to authorize the erection of bridges, the same principle applies where the legislature deems it necessary to the public welfare to make other improvements for the reclamation of swampy and overflowed lands, though certain individual proprietors may thereby be subjected to expense. The question whether Kinloch Creek could be obstructed without the permission of the Secretary of War does not arise in this case, and is specially disclaimed by the plaintiff. See Lake Shore, Etc. Railroad Co. v. Ohio, 165 U. S. 365; Leovy v. United States, 177 U. S. 621, 633; Cummings v. Chicago, 188 U. S. 410; Montgomery v. Portland, 190 U. S. 89."

This was a case in which an act of South Carolina provided for the damming up of a navigable stream for the purpose of protecting property and the welfare of the people along it, and this court held that the state had the right.

In the case of

Jessup v. Trustees of Freeholders of the Town of South Hampton, 195 U. S. 624,

the case was dismissed for want of jurisdiction, on the authority of Cummings v. Chicago and Montgomery v. Portland. The case, as disclosed by the record below, was the right of an individual, under the local authority from the state, to build a solid bank roadway across a navigable bay; the party building the embankment having secured the consent of the Secretary of War.

See 56 N. E. 538.

This case was undoubtedly dismissed for want of jurisdiction, because the only question involved was the authority granted by the state authorities and no question with reference to the authority granted by the Secretary of war. Hence no Federal question was involved.

And again, the Circuit Court of Appeals for the Seventh Circuit, in the case of

Corrigan Transit Company v. Sanitary District, 137 Fed. 851,

in which an act of the legislature of Illinois, with reference to a change in the waterway of Chicago river, was in question. The state had secured the consent of the Secretary of War to make the improvements in the river in question. The court, at page 856, with reference to the tenth section of the River and Harbor Act of 1899, says:

"Congress, acting under the commerce clause, said to Illinois, which would otherwise be sovereign, 'You are not to change the course of the river unless you first obtain the secretary's approval of your plan.' The sentence in its entirety—the subjunctive clause as well as the indicative—expressed the will of Congress. The expressed intention was not to exclude Illinois utterly from exercising her police powers over the river for the welfare of her citizens (which suggests a nice and delicate question), but to permit the continuation of the exercise upon condition."

In the present case the defendant in error had obtained, under the state boom statute, the right to construct a boom within the limits of the location selected in North River, and had received under the hand and seal of the Secretary of War (Transcript, p. 357) permission to construct the boom within the limits of such location and on the plans submitted to the war department. The Supreme Court of the State, construing the boom statute and the rights of the defendant in error thereunder, held that such rights were valid and subsisting rights and necessarily prevented the plaintiff in error from undertaking to exercise any booming rights in the same location. (Opinion, Transcript, page 380.) The position of the state court is therefore to the effect that

the plaintiff in error had no right from the state to construct any boom within the limits of the location of the defendant in error, and it therefore followed that it was immaterial, in the absence of such right, what permission, if any, the plaintiff in error had received from the Secretary of War. In the absence of the state right the plaintiff in error occupied no other or different position from that occupied by the appellants in the cases of Cummings v. Chicago and Montgomery v. Portland, *supra*. The unauthorized act of the plaintiff in error interfered with the rights of the defendant in error, and therefore the defendant in error was entitled to an injunction. All of the contentions attempted to be made by the plaintiff in error in this case are clearly disposed of by the decisions to which attention has been called.

III.

As an additional reason why the opinion of the Supreme Court of Washington was correct, we submit that the permit from the Secretary of War under the River and Harbor Act does not confer any right to build a boom or place structures in navigable waters wholly within a state, but that the right and authority to erect such structures is conferred by the state.

The function of the Secretary of War, under the said legislation of congress, is not to confer an affirmative right, but simply to pass upon and consent to the authority granted by the state. His action is not positive but negative. The object of such legislation requiring such consent is to prevent unreasonable obstructions to the navigation of the waters of the United States. This is evident from a reading of the statute under which the Secretary grants the permit. The statute does not read that any person who acquires the consent of the secretary of war shall have the right to place obstructions in the river or navigable water, but it reads that the obstructions are prohibited and it shall be unlawful to place any obstruction "except on plans recommended by the chief of engineers and authorized by the Secretary of War." This is not an affirmative authorization, but is simply

preventive, and solely for the purpose of preventing impediments to navigation.

The original authority lying in the several states to authorize obstructions in navigable waters wholly within their respective limits, was not in any way superseded by the River and Harbor acts.

Lake Shore & Michigan Southern R. R. v. Ohio, *supra;*
Cummings v. Chicago, *supra;*
Montgomery v. Portland, *supra.*

The requirement in the River and Harbor acts of the authority of the secretary of war to the plans for the obstruction of any navigable river, did not confer upon such secretary power to grant original or affirmative authority for such obstruction.

In Lake Shore & Mich. So. R. R. v. Ohio, 165 U. S., at page 368, the court says:

"The mere delegation to the secretary of the right to determine whether a structure authorized by law has been so built as to impede commerce, and to direct, when reasonably necessary, its modification so as to remove such impediment, does not confer upon that officer *power to give original authority to build bridges, nor does it presuppose that congress conceived that it was lodging in the secretary power to that end.*"

This language is cited with approval on this identical point, in Cummings v. Chicago, 188 U. S. 428.

The affirmative authority comes from the state, and the Secretary of War simply stamps with approval or disapproval the plans under the affirmative right given by the state, according to whether or not such plans will interfere with navigation. The state court refused to pass upon the sufficiency of the pretended permit of the plaintiff in error from the Secretary of War (Opinion, Trans. p. 379), for the reason that the question became immaterial inasmuch as the court had, in the former part of its opinion, held that the defendant in error had obtained the right from the state, perfected by the approval and consent of the Secretary of War of the United States, and that the plaintiff in error had acquired

no right or authority from the state as against the defendant in error.

The refusal to pass on the sufficiency of the said permit was not a decision against the pretended right or title of the plaintiff in error under the United States statute, but was rather a decision in favor of said right or title, for said opinion concedes, for the purposes of the case, the sufficiency of the alleged permit of the Secretary of War to the plaintiff in error. But, even so, conceding the sufficiency of said permit, the judgment of the state court must have been the same. As against the defendant in error, plaintiff in error had no right from the State of Washington to construct a boom within the limits of the defendant in error, and having no such right, and only a permit from the Secretary of War, the plaintiff in error occupied exactly the same position as did the appellants in the case of Cummings v. Chicago, 188 U. S. 410, and Montgomery v. Portland, 190 U. S. 189. Hence, the question of the sufficiency of the permit of the plaintiff in error from the Secretary of War was immaterial, and the refusal of the state court to pass upon it was not error.

IV.

Having thus discussed the matter generally, the attention of the court will be called, in their order, to the particular errors specified by the plaintiff in error.

First: The court did not err in not finding and deciding that the plaintiff in error had a good and valid permission from the Secretary of War to construct its boom.

The court below did not err in the particular specified for the reason that the question as to whether or not the plaintiff in error had any permission from the Secretary of War was not raised in any way whatsoever by the pleadings. The answer (Transcript, p. 297) is simply a denial of the allegations contained in the complaint and does not contain any affirmative matter setting up any title in the plaintiff in error. Without such pleading no issue was made which could permit the plaintiff in error to introduce evidence of any title in

the plaintiff in error. The whole question presented by the pleadings is simply one which related to the title of the defendant in error.

This suit was in the nature of a suit involving the title to real property. As heretofore pointed out, by statute in the State of Washington it is provided that defendant in such a suit or action shall not be permitted to put in evidence title in himself or another unless such title is especially pleaded in the answer. Having contented itself simply with a denial of the title of the defendant in error set up in the complaint, the plaintiff in error could give evidence only of facts which showed insufficiency of title of defendant in error, but could not assert or establish, under the pleadings, any affirmative title in itself.

Even if the permission of the Secretary of War had been properly pleaded in the answer, such question would have been immaterial for the reason that the court below found that the plaintiff in error had no state right to build a boom, and therefore no permission, no matter how valid, from the Secretary of War could confer any right whatsoever upon the plaintiff in error.

Second: The court below did not err in deciding that the defendant in error had a good and valid permission from the Secretary of War to hold the territory occupied by the boom of the plaintiff in error for its contingent future necessities.

The Secretary of War granted to the defendant in error permission to build a boom within the limits of the North River covered by the location (Finding of Fact No. 3, Transcript, p. 311). His only function was to see that navigation was not interfered with unreasonably. After this permission was granted the question as to whether or not the permission could be exercised was a question wholly of state law, and the court below held that the defendant in error had state authority to occupy all of the river included within its location, and therefore all of the river covered by the permission from the Secretary of War.

Third: The court did not err in not finding and deciding that the permit and license granted by the Secretary of War to plaintiff in error to construct its

boom operated as, and was, a revocation of the permit or license previously granted by the Secretary of War to construct the boom of the defendant in error.

The letter of Murphy, chief clerk of the United States Engineer at Seattle (Transcript, p. 368, Finding of Fact No. 7, Transcript, p. 312), was the only permission ever granted from the War Department to the plaintiff in error to construct any boom. This permission is a mere letter from the United States Engineer office, and is not a formal permission executed under the hand and seal of the Secretary of War such as the Secretary executes in such cases and such as was executed in favor of the defendant in error. (Plaintiff's exhibit B, Transcript, p. 357.) It does not undertake to revoke the permission given by the Secretary to the defendant in error.

This permit of the defendant in error was given without reservation, had been acted upon, and the defendant in error had expended the sum of $16,000 in the construction of its boom. It certainly would not be revoked by the Secretary of War without notice to the defendant in error, and an opportunity to be heard.

Furthermore, there is no indication whatever of an intent by the said letter to revoke the former permit theretofore granted the defendant in error. When the application of the plaintiff in error was made, the Secretary must have been mindful of the previous permit granted to the defendant in error, and the fact that there might be a conflict, hence his refusal to grant a formal permit, under his hand and seal, and hence this informal letter from the chief clerk in the Seattle Engineer's office, which could be cancelled in case of conflict much easier than a formal permit under the hand and official seal of the Secretary. Certainly this letter, signed by a chief clerk in the United States Engineer's office, could not revoke the formal permission and authority given by the Secretary of War himself to the defendant in error.

The plaintiff in error in "Proposition I," page 28, "Proposition II," page 33, "Proposition III," page 36, "Proposition IV," page 38, of its brief, is seeking now to argue that the entire controversy is one in legal effect to try title to the *locus in quo*, and to place the title exclusively on the permit from the Secretary of War,

that the alleged permit to the plaintiff in error was a revocation of the prior permit to the defendant in error, and that having only constructed its boom to the extent of the requirements of the time of construction could not increase the same to meet the increased demands of business, and finally, that the United States government only can complain of the acts of the plaintiff in error.

But the plaintiff in error sets up none of these questions in the pleadings in the State court, and did not set up any affirmative title in itself as requested to do by the State statute in actions to try title. It contended strenuously to induce the State court not to pass on such questions and succeeded in it. It cannot now shift around and attempt to try the case on ground never passed upon or presented or clamed by it below. Plaintiff in error nowhere points out in the record where such rights were claimed or relied upon.

Furthermore, section 10 of the River and Harbor Act of 1899 provides that it is unlawful to build any boom or structures in the navigable waters "except on plans recommended by the Chief of Engineers, and authorized by the Secretary of War." There is no showing made that any plans of the structure of the plaintiff in error were ever recommended by the Chief Engineer, as required. Whereas, by reference to the plans (Exhibit B, Trans., p. 357, and map immediately preceding it), it will be seen that the plans of the defendant in error had received the recommendation of the Chief of Engineers before the authority of the Secretary of War was given.

We submit that the third assignment of error is not well taken.

Fourth: The only other assignment of error which has any reference to a federal question is the tenth (Trans., p. 383), to wit, for that the court erred in giving and entering judgment impairing and violating rights of the plaintiff in error under the provisions of the Fourteenth Amendment to the Constitution of the United States.

As shown on pages 15 and 18 of the brief on the motion to dismiss this writ of error, this assignment of error is the first statement, or even mention, in regard

to the contention on the part of the plaintiff in error, and, as there pointed out, the assignment of error is no part of the record below, and a federal question there stated for the first time is not sufficient to give jurisdiction to this court on a writ of error, and such an assignment will not be considered.

The plaintiff in error seeks, in its brief, to re-examine and re-argue the entire local question submitted to the state court. This was thoroughly threshed out, and the opinion of the court and authorities there cited fully sustain the ruling of the court in those particulars. We will, therefore, not encumber this brief with a re-argument of the questions there determined, but we submit that such questions cannot be re-examined, as they involve no federal question, and in any event, we are willing to rely upon the opinion of the state court as being fully justified by the authorities cited therein.

We therefore submit that, in case this court shall not grant the motion to dismiss of the defendant in error heretofore submitted by separate brief, upon the merits the judgment of the Supreme Court of the State of Washington should be affirmed, and the defendant in error given judgment against the plaintiff in error for its costs and disbursements herein.

Respectfully submitted,

W. W. COTTON,
WELSH & WELSH, and
JAMES G. WILSON,
Attorneys for Defendant in Error.

APPENDIX.

Laws of Washington With Reference to Boom Companies.

§4378. Any corporation heretofore or hereafter organized in the State of Washington for the purpose of catching, booming, sorting, rafting and holding logs, lumber or other timber products, shall have power to acquire, hold, use and transfer all such real and personal property or estate, by lease or purchase, as shall be necessary for carrying on the business of said corporation. If such corporation shall not be able to agree with persons owning land, shore rights, or other property sought to be appropriated, as to the amount of compensation to be paid therefor, and the compensation therefor may be assessed and determined and the appropriation made in the manner provided by law for the appropriation of private property by railways: Provided, That any property acquired under the provisions of this act by the exercise of the right of eminent domain shall be used exclusively for the purposes of this act; and whenever the use of said property as herein contemplated shall cease for a period of one year, the same shall revert to the original owner, his heirs or assigns, upon the repayment of the original cost of the same. (L. '90, Sec. 1, P. 470.)

§4379. Any corporation hereafter organized for the purpose mentioned in section one of this act shall, within ninety days after its articles of incorporation have been filed, proceed to file in the office of the Secretary of State a plat or survey of so much of the shore lines of the waters of the state and lands contiguous thereto as are proposed to be appropriated for said purpose by said corporation. Any corporation heretofore organized in the Territory of Washington, for any of the purposes expressed in section one (1) of this act, shall file such plat within ninety days after the passage of this act. Such plat shall be made from the records of the United States in the Surveyor-General's office of this state, or

by a competent surveyor, subsequent to actual survey. (L. '90, Sec. 2, P. 470.)

§4380. Such corporations shall have power and are hereby authorized, in any of the waters of this state or the dividing waters thereof, to construct, maintain and use all necessary sheer or receiving booms, dolphins, piers, piles or structure necessary or convenient for carrying on the business of such corporations. Provided, That such boom or booms, sheer booms or receiving booms shall be so constructed as to allow the free passage between any of such booms and the opposite shore for all boats, vessels or steam crafts of any kind whatsoever, or for ordinary purposes of navigation. (L. '90, Sec. 3, P. 471.)

§4381. After such works shall have been constructed, such corporation shall catch, hold and assort the logs and timber products of all persons requesting such service, upon the same terms and without discrimination; and shall have the right, in consideration of the convenience and security afforded to the public in the handling of logs and timber products, to charge and collect tolls on all logs or other timber products, caught within their works and upon the order or request of the owner or owners thereof, and there assorted, boomed or rafted; said tolls shall not exceed seventy-five cents per thousand feet on logs, spars or other large timber, and reasonable rates on all other timber products: *Provided*, That it shall be the duty of any corporation operating a boom at the mouth of any river, to catch and hold, assort, boom and raft all logs and timber products except such as may be already in charge of its owner or his agents without request of the owner or owners, and shall have the right to charge and collect tolls not to exceed seventy-five cents per thousand feet for such service. The amount of logs or timber is to be board measure, to be ascertained by the usual legal method of scaling; and such corporation shall have a lien upon the logs and timber products for the driving, floating, booming, sorting and rafting thereof, and the right to enforce such liens in any manner provided or that may be provided by law for the enforcement of liens upon personal property. Such corporation

shall, as soon as practicable, deliver logs or other timber products caught within their booms sorted and rafted ready for towing, to the owner or owners thereof, and if required to hold such property for more than thirty days, shall have the right to charge a reasonable rate for such storage for the period of excess. (L. '90, Sec. 4, P. 471.)

§4382. It shall be the duty of all said boom corporations, in assorting, to separate the logs, lumber or other timber products into separate booms ready for towing, so that logs or other timber products shall go to the mills or place intended for use or storage in one or more booms: *Provided.* That in case more than one boom is located on or in the same river or its tributaries the corporation owning the upper boom or works shall pass free of charge all saw-logs or other timber products consigned to the lower boom or booms. (L. '90, Sec. 5, P. 472.)

§4383. It shall be the duty of every corporation organized and transacting business under the provisions of this act to keep in the office of its secretary, open to public inspection, a book or books in which shall be truly recorded the facts, so far as known, regarding each and every raft by it assorted. Such record shall specify: 1st, names of owners; 2d, marks or brands; 3d, number of logs in each boom; 4th, number of feet in boom; 5th, name of steamer receiving possession; 6th, date of departure from boom. (L. '90, Sec. 6, P. 472.)

§4384. Corporations organized in accordance with the provisions of this act shall be liable to the owner or owners of logs or other timber products for all loss or damage resultant from neglect, carelessness or unnecessary delay on part of servants of such corporations: *Provided,* That loss caused by fire and ice, which cannot be reasonably guarded against, shall not be construed as resultant upon neglect or carelessness on the part of the corporation. (L. '90, Sec. 7, P. 472.)

§4385. In addition to such damages as are herein provided for any corporation wilfully neglecting to assort and deliver such logs and timber products accord-

ing to the provisions of this act, it shall be liable to a fine not exceeding twenty per centum of the value of such property which it shall have failed to deliver, but no such corporation shall be liable to such damages or penalty if said owner or owners of such logs or timber products shall have failed to furnish the necessary boom sticks and chains to raft the same. (L. '90, Sec. 8, P. 472.)

§4386. All meandered rivers, meandered sloughs and navigable waters in this state shall be deemed as public highways, and said corporations shall be declared public corporations for the purpose of this act; and the improvement of such streams, sloughs and waters shall be deemed and declared a public use and benefit.

§4387. Any corporation having for its object, in whole or in part, the clearing out and improvement of rivers and streams in this state, and for the purpose of driving, sorting, holding and delivering logs and other timber products thereon, may be organized under the laws of this state, and in accordance with the provisions of the codes and statutes of Washington, as set down and numbered in volume 1 of Hill's Annotated Statutes and Codes of Washington, sections 1497 to 1520, inclusive, and such corporations shall have all powers and be subject to all the liabilities and duties therein mentioned. (L. '95, Sec. 1, P. 128.)

§4388. Such corporation shall have power to acquire, hold, use and transfer all such real estate and personal property or estate, by lease or purchase, as shall be necessary for carrying on the business of said corporation. If such corporation shall not be able to agree with persons owning land, shore rights or other property sought to be appropriated, as to the amount of compensation to be paid therefor, the compensation therefor may be assessed and determined and the appropriation thereof be made in the manner provided by law for the appropriation of private property in chapter 6 of title 9, volume 2, Hill's Annotated Statutes and Codes of Washington: *Provided*, That any property acquired under the provisions of this act for the purposes herein mentioned by the exercise of

the right of eminent domain shall be used exclusively for the purposes aforesaid; and whenever the use of said property acquired by the right of eminent domain, as herein contemplated, shall cease for a period of one year, the same shall revert to the original owner, his heirs or assigns. (L. '95, Sec. 2, P. 129.)

§4389. Any corporation organized for the purposes mentioned in section one of this act shall, within ninety days after its articles of incorporation shall have been filed, proceed to file in the office of the Secretary of State a plat or survey of so much of the shore lines of the waters of the state or of any of the rivers or streams thereof and lands contiguous thereto as are proposed to be appropriated for such purposes by said corporation. Such plat shall be made from the records of the United States in the office of the Surveyor-General of this state, or by a competent surveyor, after actual survey, from the notes thereof, and whenever such appropriation is made upon unsurveyed lands, then by an actual survey made by a competent surveyor. Such corporation may from time to time, whenever it desires to extend its operations to portions of streams not embraced in its original plat, or to other streams tributary to the stream or streams described in such original plat, or any portion of such streams, file additional plats in the office of the Secretary of State, and whenever by reason of floods or otherwise, the channel of any stream shall be so changed as to put such streams beyond the limits of said original plat, or any supplemental or additional plat filed pursuant to the provisions of this section, such corporation may file in the office of the Secretary of State supplemental plats showing the change in said channel which shall vest it with the same rights that is acquired by the filing of said original plat. (L. '05, Sec. 1, Chap. 119.)

§4390. Such corporation shall have power and is hereby authorized in any of the rivers and streams of this state, or the dividing waters thereof, to remove jams, roots, snags and rocks, improve and straighten the channel, build wing dams and sheer booms, construct dams and gates, or otherwise, for the purpose of storing water with which to produce artificial freshets and for the pur-

pose of holding logs and other timber products and in all ways to improve such streams and rivers for the purposes herein mentioned and contemplated: *Provided,* That no such wing dam, sheer boom, dam with gate or otherwise, shall be so constructed, maintained or used as to in any manner obstruct or impede the outlet of such stream: *And provided further,* That if any such wing dam, sheer boom, dam with gate or otherwise shall be so constructed, maintained or used as to interfere with the use for any purpose of the waters of any stream so dammed or used, or any of its tributaries, or in any manner to injure or damage any lands adjacent to such stream or its tributaries, compensation for such interference with the use of such water and for any such injury or damage shall first be assessed and determined and the appropriation thereof may be made by the exercise of the power of eminent domain in the manner provided in section two of this act: *Provided, however,* That whenever the owners of more than one-half of the land lying alongside or abutting on any stream affected by the tide, proposed to be improved according to this act, shall file with the Board of County Commissioners of the county in which said river is situated a remonstrance against any improvements of so much of the stream as is affected by the tide, it shall then be unlawful for any corporation to take the land or any slough within the territory owned by any such remonstrancers: *Provided,* That such remonstrance shall be filed with said board within fifteen days from the filing of said plat. Nothing in this act shall be construed to authorize the taking or damaging of any power plant constructed or being constructed for the creation or utilization of water power. (L. '05, Sec. 1, Chap. 57.)

§4391. After such corporation shall have entered upon its duties, which shall be within three months of the time of filing of its maps of location, such corporation shall come in streams theretofore navigable, upon the request of the owners, and in case of logs and other timber products being commingled, or lying in such a position as to obstruct or impede the drive, without such request, and in streams not navigable before such improvements were made, without request, sluice, sack

and drive all logs and other timber products of suitable lengths that may be placed in the beds of the stream improved as aforesaid, or that may be delivered into its ponds, and shall handle all such logs and other timber products of all persons upon the same terms, without discrimination as to time of sluicing, sacking and driving such logs, or other timber products, and shall be entitled to charge and collect reasonable and uniform tolls for such services on all logs and other timber products so handled; such tolls shall not exceed one dollar per thousand feet, board measure, on logs, spars, or other large timber, and reasonable compensation on all other timber products, for sluicing, sacking and driving the same, such charges to be fixed by the board of trustees of such corporation in proportion to the distance such timber is to be driven and the number of dams through which the same is necessarily sluiced, and in case any such corporation shall be engaged in the booming and rafting of logs and other timber so sluiced, sacked and driven, an additional sum not exceed[ing] sixty cents per thousand feet for logs, spars and other large timber, and reasonable compensation on all timber products may be charged for booming and rafting the same; the amount of such logs and other products is to be determined by the usual method of scaling, and such corporations shall have a lien upon all logs and other timber products handled for sluicing, sacking and driving, and for booming and rafting the same, to be enforced in any manner now or hereafter provided by law for the enforcement of liens for labor on logs. (L. '01, Sec. 1, P. 295.)

§4392. Any corporation acting under and in accordance with the provisions of this act shall be liable to the owner or owners of logs or other timber products for all loss or damage resulting from neglect, carelessness or unnecessary delay on the part of such corporation or its agents. (L. '95, Sec. 6, P. 131.)

§4393. Should any corporation neglect, for the period of eight months after improving any stream or river, to operate its dams, or to otherwise perform its duties as herein provided, then all rights herein conferred to such

corporations upon such streams or rivers, or portions thereof, shall cease. (L. '95, Sec. 7, P. 131.)

§4394. Duly organized boom companies at present operating upon any of the streams or rivers of this state may file amended articles of incorporation to embrace the provisions of this act, and for the purpose of time limitations mentioned in this act, the time of filing such amended articles of incorporation shall be deemed to be the time of organization thereof, but failure to comply with the provisions of this act shall work forfeiture of the rights of such corporations only so far as the same are subjoined under the provisions of this paragraph. (L. '95, Sec. 8, P. 131.)

The boom laws above are set out as they exist today. Sections 4389 and 4390 were amended in 1905 in particulars immaterial to this controversy.

NORTH SHORE BOOM AND DRIVING COMPANY *v.* NICOMEN BOOM COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 107. Argued January 29, February 1, 1909.—Decided February 23, 1909.

A State, in the absence of any statute by Congress, has plenary power in regard to navigable streams wholly within its boundaries; and obstructions in such streams, in the absence of statute, constitute no offense against the United States, and whether obstructions are unlawful under state law is not a Federal question. *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1.

Where a Federal law is applicable requiring consent of the Federal Government there is concurrent or joint jurisdiction of the state and National governments over the erection of structures obstructing navigation of a navigable stream wholly within a State. *Cummings* v. *Chicago*, 188 U. S. 410; *Montgomery* v. *Portland*, 190 U. S. 89.

Section 10 of the River and Harbor Act of March 3, 1899, c. 425, 30 Stat. 1151, alters § 7 of the River and Harbor Act of September 19, 1890, c. 907, 26 Stat. 454, and prohibits obstructions in navigable waters of the United States not affirmatively authorized by Congress, and whether the State has assented to such obstructions remains with the State alone and is not a Federal question reviewable by this court under § 709, Rev. Stat.

Writ of error to review 40 Washington, 315, dismissed.

THE Nicomen Boom Company, hereinafter called the plaintiff, commenced an action against the North Shore Boom and Driving Company, hereinafter called the defendant, in the Superior Court of the State of Washington, Pacific County, to enjoin the defendant from building a boom in the North River, (a river wholly within the boundary of the State of Washington), within the locality designated in the plaintiff's plat and survey for its boom.

The action was founded upon the allegations that the plaintiff was the first to file its plat, and that it commenced to build its boom under the statutes of the State of Washington, and

that the defendant was threatening to build its boom within the locality marked out and designated by the plaintiff in its plat or survey filed with the Secretary of State, although its boom had not actually been completed the whole distance indicated in such plat or survey.

The defendant denied the various allegations of the plaintiff and the parties went to trial, which resulted in a judgment for the defendant, dismissing the plaintiff's complaint. The plaintiff appealed to the Supreme Court of the State, where the judgment was reversed and the cause remanded to the Superior Court, with directions to enter judgment enjoining the defendant from building the boom within the location marked on the plat or survey for the plaintiff's boom. See the opinion of the state court, 40 Washington, 315, showing plainly and in full the grounds of the decision.

The defendant has sued out a writ of error from this court and brings the judgment here for review.

Mr. Charles E. Miller and *Mr. John M. Thurston*, with whom *Mr. W. H. Abel*, *Mr. James B. Howe* and *Mr. Samuel H. Piles* were on the brief, for plaintiff in error:

Both boom companies were incorporated long after the passage of the act of Congress of September 19, 1890, and both recognized the authority of Congress by securing permission from the Secretary of War to erect their respective boom structures. If either company had attempted to erect its boom without the Federal assent, it would have been very promptly stopped and ejected from the river by the Secretary of War. Hence, the authority of any person to thus occupy this stream is wholly a Federal question, whether the right questioned is under the Federal or state statutes. *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 218; *Cummings* v. *Chicago*, 188 U. S. 410.

The erection of a structure in a navigable river, within the limits of a State, depends upon the concurrent or joint assent of both the National Government and the state government.

The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. *Cummings* v. *Chicago*, 188 U. S. 410; *Montgomery* v. *Portland*, 190 U. S. 89.

As the authority over the navigable waters of the United States is paramount in Congress and any voice in their control by the States is only by the grace of Congress, which may be withdrawn at any time, as to what constitutes the assent of a State, to be concurrent with National assent, is, *ipso facto*, a Federal question.

The Washington Supreme Court held that the filing of a boom plat was analogous to the filing of a plat for right of way by a railroad corporation which would hold the location until actual abandonment and that therefore the defendant in error had the state assent and that plaintiff in error did not have such assent. This was the sole question in the case and from its very nature could only be a Federal question. *Blythe* v. *Hinckley*, 180 U. S. 333; *Am. Sugar R. Co.* v. *Louisiana*, 179 U. S. 89; *Douglass* v. *Wallace*, 161 U. S. 346.

It must appear from the record that the question was necessarily involved in the decision; and that the state court could not have given the judgment or decree, which it has passed without deciding it. *Armstrong* v. *Athens Co.*, 16 Pet. 281.

This case is cited in many cases, notably the following: *Moore* v. *Mississippi*, 21 Wall. 638; *Murray* v. *Charleston*, 96 U. S. 442; *Crossley* v. *New Orleans*, 108 U. S. 105; *Weatherby* v. *Bowie*, 131 U. S. ccxv; *Kaukauna Water Power Co.* v. *Green Bay & M. C. Co.*, 142 U. S. 69; *Gulf Etc. R. R.* v. *Hewes*, 183 U. S. 66; *Anderson* v. *Carkins*, 135 U. S. 483; *Powell* v. *Brunswick Co.*, 150 U. S. 433.

It is not necessary that the treaty or act of Congress on which the Federal right is based should have been pleaded specially or spread upon the record. It is sufficient if the record shows that it must have been construed. *McCullough* v. *Virginia*, 172 U. S. 118, and see also *Wedding* v. *Meyler*,

192 U. S. 573; *Covington* v. *Sanford*, 164 U. S. 595; *Mitchell* v. *Clark*, 110 U. S. 645; *Boyd* v. *Nebraska*, 143 U. S. 180; *Des Moines* v. *Iowa H. Co.*, 123 U. S. 555; *Erie R. Co.* v. *Purdy*, 185 U. S. 148; *Snell* v. *Chicago*, 152 U. S. 191; *Muter* v. *Montgomery*, 156 U. S. 385; *Walter A. Wood Co.* v. *Skinner*, 139 U. S. 295; *Cook Co.* v. *Calumet Dock Co.*, 138 U. S. 365; *C., B. & Q. R.* v. *Chicago*, 166 U. S. 228.

Mr. James G. Wilson, with whom *Mr. W. W. Cotton* was on the brief, for defendant in error:

A writ of error from the Supreme Court of the United States to the Supreme Court of a State, can be sustained only when the decision is against the right specially set up or claimed under the Constitution and laws of the United States, and if the decision of the state court rests upon independent grounds of law, sufficient to sustain it, but not involving a Federal question, the Supreme Court of the United States has no jurisdiction and will dismiss the writ of error, and this, even in a case where a Federal question is also decided. Taylor on Jur. and Pro. of U. S. Supreme Court, §§ 238–240; *Rutland R. R. Co.* v. *Central of Vermont R. R. Co.*, 159 U. S. 638; *Eustis* v. *Bolles*, 150 U. S. 366; *Cal. Powder Co.* v. *Davis*, 151 U. S. 393; *Giles* v. *Teasley*, 193 U. S. 160; *Sawyer* v. *Piper*, 189 U. S. 156; *Harrison* v. *Morton*, 171 U. S. 46; *Allen* v. *Arguimbau*, 198 U. S. 154; *Chapin* v. *Fye*, 179 U. S. 128; *Corkran Oil Co.* v. *Arnaudet*, 199 U. S. 193; *Fullerton* v. *Texas*, 196 U. S. 192; *Capital Bank* v. *Cadiz Bank*, 172 U. S. 425; *Dower* v. *Richards*, 151 U. S. 666; *Egan* v. *Hart*, 165 U. S. 188; *McMillan* v. *Ferrum Min. Co.*, 197 U. S. 343.

The mere fact that the controversy arose out of a location in a navigable water in the United States, or under a statute of Congress, would not necessarily raise a Federal question within § 709 of the Revised Statutes. *Egan* v. *Hart*, 165 U. S. 188; *McMillan* v. *Ferrum Min. Co.*, 197 U. S. 347; *Telluride P. T. Co.* v. *Rio Grande W. R. Co.*, 175 U. S. 643.

The effect of § 10 of the River and Harbor Act is to make

the erection of a structure in a navigable river within the limits of a State dependent upon the concurrent or joint assent of both the National Government and the state government. The question of whether or not the assent of the National Government had been acquired might raise a Federal question and authorize a writ of error, but the question of whether or not the assent of the State had been obtained, is purely a matter of local and state law and does not involve a Federal question. *Cummings* v. *Chicago*, 188 U. S. 431; *Montgomery* v. *Portland*, 190 U. S. 103.

MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court.

This is a contest between two boom companies incorporated under the laws of the State of Washington, authorizing the organization of corporations of this kind.

In April, 1900, the plaintiff, after its organization, filed in the office of the Secretary of State of Washington its plat or survey, showing so much of the shore lines and waters of the North River and lands contiguous thereto as it proposed to appropriate under the laws of the State. Before beginning its boom it submitted to the Secretary of War of the United States the plan of its proposed improvement and a plat of the territory to be occupied thereby, and was granted permission by the War Department to construct a boom within the limits of the river covered by the plat. The plaintiff proceeded to erect its boom along the left side of the river, but stopped short of the upper end of the territory covered by its plat of location. The boom was substantially constructed at a cost of about $16,000, and has been operated from the time of its erection as originally constructed; and plaintiff has always expected to extend the boom within the limits of the plat of location as the demands of business might require. Some days before the commencement of the actual work of extending the plaintiff's boom the defendant commenced to construct its boom within the limits of the original plat of the plaintiff.

The defendant was organized in 1903 and filed its plat and survey in the office of the Secretary of State of the State of Washington, and it alleges that before commencing to construct its boom it secured from the War Department of the United States permission to construct the boom within its location. The boom of the defendant, if constructed according to its plans, would cause logs coming down the river intended to reach the plaintiff's boom to enter the main boom of the defendant. The booms, as proposed by the plaintiff and defendant, cannot both be constructed. If the boom of the plaintiff should be extended up the river within the limits of its plat and survey, the passage between its line of dolphins and the dolphins of the defendant on the other side of the stream would be so narrow as to block navigation. Moreover, it would be impracticable to operate both booms under such circumstances. If the defendant is permitted to operate its boom as intended, the boom of the plaintiff will receive only such timber from up the river as may escape from the boom of the defendant and such as may be transmitted through that boom to the plaintiff. These facts are practically undisputed and are found in the record and findings of the court.

The Federal Government has taken no part in the dispute between the two corporations. The laws of the State provide for proceedings to build booms and the defendant contends that it complied with those statutes, and had also obtained from the chief clerk of the War Department a written statement, dated March 23, 1903, stating that the War Department would not interpose any objection to the construction and maintenance of the boom in the manner proposed by the defendant, so long as it did not unreasonably interfere with navigation.

Several laws have been passed by Congress, contained in the River and Harbor Appropriation Acts, prohibiting obstructions in the waters of the United States, and also providing for getting the consent of the Government, through the Secretary of War, to the building of booms, bridges, etc. See

act of 1890, 26 Stat. 454, chapter 907, §§ 7, 10. Also act of March 3, 1899, 30 Stat. 1151, chapter 425, § 10.

The state court did not find it necessary to decide the question whether the defendant had complied with the Federal statute in regard to the building of its boom, but held that it had not complied with the statutes of the State of Washington in regard to the building of such proposed boom, and it therefore had no right to build it, and it enjoined the defendant from so doing, and directed judgment to be entered to that effect.

Before discussing the merits of the case the defendant in error made a motion to dismiss the writ of error for the want of jurisdiction, there being, as it asserts, no Federal question reviewable under § 709 of the Revised Statutes.

The river in question is a navigable stream, entirely within the State of Washington, and, in the absence of any statute by Congress, a State has plenary power in regard to such waters. Obstructions in those waters may be offenses against the laws of the State, but constitute no offense against the United States in the absence of a statute. *Willamette Iron Bridge Company* v. *Hatch*, 125 U. S. 1. The question whether the acts complained of, such as obstructions, etc., in the river, are lawful or unlawful under the state law, is, as was said in the above cited case (page 9), a state question, not a Federal one. Where there is a Federal law which it is claimed also applies to the subject and requires the consent of the Federal Government, then there is a concurrent or joint jurisdiction of the state and National governments over the erection of a structure which obstructs navigation. *Cummings* v. *Chicago*, 188 U. S. 410; *Montgomery* v. *Portland*, 190 U. S. 89.

It is contended, however, on the part of the counsel for the defendant that whether the assent of the State has been given to the erection of the structure is in and of itself a Federal question, and he cites *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211, 218, as authority for the proposition. That case was commenced in the Circuit Court of the United States for the State of Washington, Northern Division, and was

brought by the United States under the direction of the Attorney General, pursuant to the provisions of § 10 of the River and Harbor Bill of 1890, 26 Stat. *supra*. It was brought to enforce the right of the Government to prevent the erection of a structure that obstructed the navigation of the river. It was held in that case that the words in the tenth section, "not affirmatively authorized by law," referred to the state as well as to the Federal law, and that the question then arose as to whether the structure was permitted by that [state] law, and as the law of Congress provided that it might be permitted if affirmatively authorized by a state law, the question whether it was so authorized became in effect a question whether the Federal law did or did not permit it. If it were authorized by the state law, then the Federal law provided that it might continue; and whether it was or not, became a Federal question.

This is not such a case, and it is not brought by the Government under the section above mentioned, but the suit concerns private parties only, and the statute does not, in the section applicable, refer to any state law as in the case cited. Section 7, River and Harbor Act of 1890, 26 Stat. 454, chapter 907. And § 10 of chapter 425 of the Laws of 1899, 30 Stat. 1551, *supra*, alters the tenth section of the statute of 1890 by providing: "That the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is hereby prohibited." It leaves out the words "not affirmatively authorized by law," and substitutes "not affirmatively authorized by Congress." There is, therefore, no reference to state action or state law. Obstruction not affirmatively authorized by Congress is prohibited, but the case of the state assent remains with the State for its sole adjudication.

The construction of the boom of defendant in this case, the state court has decided, was not authorized by the State. Whether it was or not, is not a Federal question. The writ of error is therefore

Dismissed.